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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 463

LEE ARENAS, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The district court wrote no opinion. The reasons for the district court's action appear in the judgment (R. 59–60). The opinion of the circuit court of appeals (R. 74–75) is reported in 137 F. (2d) 199.

JURISDICTION

The judgment of the circuit court of appeals was entered June 30, 1943 (R. 76–77). Petition for rehearing was denied August 4, 1943 (R. 77). The petition for a writ of certiorari was filed October 29, 1943, and was granted December 20, 1943 (R. 78). The jurisdiction of this Court rests on section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, under the applicable legislation, the pleadings, and the facts of the case, the district court properly granted the Government's motion for summary judgment on the grounds: (1) that petitioner has no right to allotments in severalty on the Mission Indian Reservation at Agua Caliente or Palm Springs, California, on the basis of selections for allotment thereon which have never been approved by the Secretary of the Interior and (2) that the United States is not estopped to deny that he has such right.

STATUTES INVOLVED

The Act of January 12, 1891, 26 Stat. 712, and section 3 of the Act of March 2, 1917, 39 Stat. 969, 976, relating to the Mission Indian reservations, are summarized at pp. 3–5 of the Statement and appear at pp. 52–58 and p. 58, respectively, of the Appendix.

STATEMENT

Petitioner brought this action under the provisions of the Act of August 15, 1894, 28 Stat. 286, 305, as amended, 25 U. S. C. sec. 345, to determine whether he is entitled to allotments in severalty and trust patents therefor on the Mission Indian Reservation at Agua Caliente or Palm Springs, California. The material facts of the case are as follows:

The Act of January 12, 1891, 26 Stat. 712, provided for the appointment of commissioners to arrange a just and satisfactory settlement of the Mission Indians of California on reservations (sec. 1), the selection and definition by the commissioners of a suitable reservation for each band or village of such Indians (sec. 2), and the issuance for each such reservation of a patent declaring that the United States "does and will hold the land thus patented, subject to the provisions of section four of this act, for the period of twenty-five years, in trust, for the sole use and benefit of the band or village to which it is issued, and that at the expiration of said period the United States will convey the same or the remaining portion not previously patented in severalty by patent to said band or village, discharged of said trust, and free of all charge or incumbrance whatsoever" (sec. 3).[1] Section 4 of the Act provided that "whenever any of the Indians residing upon any reservation patented under the provisions of this act shall, in the opinion of the Secretary of the Interior, be so advanced in civilization as to be capable of owning and managing land in severalty, the Secretary of the Interior may cause allotments to be made to such Indians, out of the land of such reservation" in specified

[1] Thirty such reservations were set apart and patented in trust pursuant to this legislation. Hearings, S. Comm., Indian Affairs, S. 1424 and 2589, 75th Cong., 1st sess., pp. 141–142.

quantities.[2] Section 5 provided that "upon approval of the allotments provided for in the preceding section by the Secretary of the Interior he shall cause patents to issue therefor in the name of the allottees, which shall be of the legal effect and declare that the United States does and will hold the land thus allotted for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State of California, and that at the expiration of said period the United States will convey the same by patent to the said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or encumbrance whatsoever."[3]

Section 3 of the Act of March 2, 1917, 39 Stat. 969, 976, amended section 4 of the Act of 1891, *supra*, to authorize and direct the Secretary of the Interior to cause allotments to be made to Indians

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[2] Each head of a family was to receive not more than six hundred and forty acres nor less than one hundred and sixty acres of pasture and grazing lands, and in addition thereto not exceeding twenty acres, as the Secretary of the Interior should deem advisable, of arable land in some suitable locality; and each single person over twenty-one years of age not less than eighty nor more than six hundred and forty acres of pasture or grazing land and not exceeding ten acres of arable land.

[3] Pursuant to this legislation, a number of allotments in severalty were made on each of three of the Mission Indian reservations, but none was made on the reservation at Agua Caliente or Palm Springs. Hearings, S. Comm., Indian Affairs, S. 1424 and 2589, 75th Cong., 1st sess., p. 142.

on the Mission Indian reservations in areas as provided in section 17 of the Act of June 25, 1910, 36 Stat. 859, instead of as provided in section 4 of the Act of 1891.[4]

On or about June 7, 1921, the Secretary of the Interior appointed one Harry E. Wadsworth as Special Allotting Agent at Large for the Mission Indian reservations of California, and instructed him to prepare schedules of selections for allotments thereon (R. 3–4). In 1923, the Department of the Interior received from Wadsworth a schedule showing selections for allotments for fifty members of the Agua Caliente or Palm Springs Band of Indians on their reservation. The Secretary of the Interior disapproved this schedule because it was found that many of the Indians did not want allotments and had not voluntarily made the selections listed in their names. He then instructed Wadsworth to prepare a new schedule listing only selections volun-

[4] Section 17 of the 1910 Act modified the Act of February 28, 1891, 26 Stat. 794, amending the General Allotment Act of February 8, 1887, 24 Stat. 388, to authorize the Secretary of the Interior to make allotments to certain Indians "in such areas as in his opinion may be for their best interest not to exceed eighty acres of agricultural or one hundred and sixty acres of grazing land to any one Indian."

Subsequent to the Act of March 2, 1917, *supra*, allotments in severalty were made and individual trust patents issued therefor to 733 Mission Indians on eight of the Mission reservations other than the one at Agua Caliente or Palm Springs. Hearings, S. Comm., Indian Affairs, S. 1424 and 2589, 75th Cong., 1st sess., pp. 142–143.

tarily made. Hearings, S. Comm., Indian Affairs, S. 1424 and 2589, 75th Cong., 1st sess., pp. 143, 154, 162.

In 1927, the Department received from Wadsworth a new schedule showing voluntary selections for twenty-four members of the Palm Springs Band of Indians. Generally, each selection included a two-acre town lot, five acres of irrigable land, and forty acres of desert land. The town lots chosen were all in Section 14, Township 4, South, Range 4, East, which section is immediately east of the business area of the city of Palm Springs.[5] Each Indian for whom a selection was listed received from Wadsworth a certificate of selection for allotment, which was stamped, "Not valid unless approved by the Secretary of the Interior."[6] Appended to the schedule was the following:

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[5] The Indian lands within the Agua Caliente or Palm Springs Reservation, with the exception of some lands which were purchased for them, comprise only the even-numbered sections, the odd-numbered sections having passed under a railroad grant or been otherwise disposed of. The city of Palm Springs extends over some of the odd-numbered sections of the reservation.

[6] Petitioner's certificate, which is typical, is as follows (R. 9):

"5–201

"SELECTION FOR ALLOTMENT

"On Agua Caliente Indian Reservation, 1923.

"This is to Certify That Lee Arenas has selected the Lot No. 46, Sec. 14, Tract No. 39, Sec. 26, and E. ½ SW. ¼ NW. ¼ & SE ¼ NW. ¼ NW. ¼ & SW.¼ NE. ¼ NW ¼ of Sec. 26, all in Township 4 South, Range No. 4 East of the

PALM SPRINGS, CALIF., *May 9, 1927.*

This is to certify that listing of allotment selections for the Indians of the Palm Springs (Agua Caliente) Indian Reservation, Calif., began on June 1, 1923, and the same was completed on May 9, 1927; and that it is further certified that the allotments shown hereon were made in accordance with the provisions of the act of Congress of February 8, 1887 (24 Stat. L. 388), as amended by the act of June 25, 1910 (36 Stat. L. 855). and supplemented by the Act of Mar. 2, 1917 (39 Stat. L. 969–76).

H. E. WADSWORTH,
Special Allotting Agent,
District Superintendent in Charge,
Mission Indian Agency, Calif.

In August of 1929 the 1927 schedule was submitted to the Department through the General Land Office with the recommendation that it be approved except as to five forty-acre tracts, which were adjacent to the city of Palm Springs and disproportionate in value to the other lands open to allotment.[7] Thereafter, the Indians in whose

San Ber. M., containing 47 acres, more or less, according to Government Survey. Stake No. ———.

"Not valid unless approved by the Secretary of the Interior.

"6–1060.

"(Signed) H. E. WADSWORTH,
"*U. S. Special Allotting Agent.*"

[7] These five tracts did not include any of the forty-acre tracts among the selections for allotment here involved.

names these tracts were listed were requested to make other selections more nearly comparable in value to the other lands available for selection, but they refused to do so. Administrative action on these selections was then suspended. Meanwhile, opposition to the making of allotments in severalty developed among the members of the Palm Springs Band of Indians, and as a result administrative action on the 1927 schedule was further delayed. During this period the conclusion was reached in the Department that in fairness to the Band as a whole and from the standpoint of their best interests, the lands scheduled for allotment should be held in a tribal status and dealt with as a tribal asset. This conclusion was founded upon the existence of opposition among the Band to the program of allotment; the fact that the reservation was unsuited to agricultural use because of a lack of water for irrigation purposes; and the great value of the lands in proximity to the city of Palm Springs, which had developed into a famous winter resort. Hearings, S. Comm., Indian Affairs, S. 1424 and 2589, 75th Cong., 1st sess., pp. 129–132, 143, 154, 162.

In 1935, the Secretary of the Interior recommended to Congress a bill, authorizing him to make a long-term lease of the reservation lands. The bill was recommended by the House Committee on Indian Affairs, and a similar bill was recommended by the Senate Committee on Indian

Affairs, but both failed of enactment. H. Rep. No. 1521, 74th Cong., 1st sess.; S. Rep. No. 1201, 74th Cong., 1st sess. See also, Hearings, S. Comm., Indian Affairs, S. 1424 and 2589, 75th Cong., 1st sess., pp. 2–7. In 1937, the Secretary recommended enactment of two other bills, one a bill to repeal the provisions of the Act of March 2, 1917, 39 Stat. 976, relating to the making of allotments on the Mission Indian reservations,[8] and the other a bill to authorize the sale of part of the Palm Springs Reservation. The former was reported favorably by the Senate Committee on Indian Affairs, but these two bills also failed of enactment. S. Rep. No. 1238, 75th Cong., 1st sess.; Hearings, S. Comm., Indian Affairs, S. 1424 and 2589, 75th Cong., 1st sess.; Hearings, H. Comm., Indian Affairs, H. R. 7450, 75th Cong., 3d sess.

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[8] This bill was as follows:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the proviso in the Act of March 2, 1917, appearing on page 976 of volume 39 of the United States Statutes at Large, relating to the making of allotments in severalty to the Indians belonging to and having tribal rights on the Mission Indian Reservations in the State of California be, and the same is hereby, repealed and, until otherwise provided by Congress, the Secretary of the Interior is hereby directed not to perfect or complete any allotments heretofore listed or scheduled to any of said Indians which have not been approved by the Secretary of the Interior prior to the passage of this Act: *Provided, however*, That nothing herein contained shall be construed to deprive any Indian of rights, if any that may have vested prior to the approval of this Act."

Meanwhile, in 1936, eighteen actions for trust patents were filed in the district court with respect to selections listed on the 1927 schedule. The gist of the complaints in these actions was that the appointment of Wadsworth as Special Allotting Agent with instructions to list selections for allotments on the Palm Springs Reservation constituted a determination by the Secretary of the Interior that the Palm Springs Band of Indians had so far advanced in civilization as to be capable of owning and managing allotments in severalty and that the listing and scheduling of the selections for allotments amounted to the making of the allotments. The district court held that selection and scheduling was not equivalent to allotment; that under sections 4 and 5 of the Act of January 12, 1891, 26 Stat. 712, the Secretary had authority in his discretion to approve the selections for allotment or not; that section 3 of the Act of March 2, 1917, 39 Stat. 969, 976, did not repeal this discretionary authority; and that in the absence of his approval of the allotment selections the complainants were not entitled to allotments. Judgment was entered against the complainants. *St. Marie* v. *United States,* 24 F. Supp. 237 (S. D. Cal., 1938). The circuit court of appeals affirmed, holding that the listing of selections for allotment was preliminary and that the approval of the Secretary was required, 108 F. (2d) 876 (C. C. A. 9, 1940). Certiorari was ap-

plied for and was denied on October 14, 1940, because the petition was filed out of time. 311 U. S. 652.

In the following year petitioner instituted the present action, seeking judgment that he was entitled to allotments in severalty on the Palm Springs Reservation (R. 2–48). The complaint alleged that petitioner was qualified for allotment in severalty (R. 2–3, 17–19, 23, 28); that on or about June 7, 1921, the Secretary determined that, in his opinion, the Palm Springs Band of Indians, including petitioner, was so far advanced in civilization as to be capable of owning and managing allotments in severalty, and instructed Wadsworth to make the allotments (R. 3–4); that on or about June 23, 1923, petitioner made his selection for allotment, received from Wadsworth a certificate of selection for allotment, which was stamped, "Not valid unless approved by the Secretary of the Interior," and had his selection listed on official schedules prepared by Wadsworth (R. 4–9, 18–19, 23–24, 28–29); that in October of 1923 Wadsworth, after inquiry made of officials of the Indian Office at Washington, D. C., advised petitioner that he might take possession of the lands selected and have the exclusive use thereof for the purpose of cultivation and planting of early crops and Wadsworth encouraged him in this (R. 10–11, 19–20, 25, 29–30); that Wadsworth represented to them that his certifi-

cate of selection for allotment would be evidence of his vested right to possess, hold and improve the lands pending issuance of trust patents (R. 11–12, 19–20, 25, 29–30); that the Commissioner of Indian Affairs and the Secretary of the Interior represented to him that trust patents would be issued (R. 12, 20, 25, 30); that in reliance upon these acts and representations on the part of the Special Alloting Agent, the Commissioner of Indian Affairs, and the Secretary of the Interior, petitioner entered upon and substantially improved the lands by erecting thereon buildings and other structures suitable for residential and business purposes (R. 12–14, 20–21, 25–26, 30); that they would not have so improved the lands but for such acts and representations (R. 12–14, 20–21, 25–26, 30); that by reason of such acts and representations, the United States is estopped to deny petitioner's title to the lands selected or that trust patents should be issued (R. 14, 32); and that in withholding approval of the allotment selections, the Secretary has acted arbitrarily and unlawfully (R. 33–44). The complaint prayed for a judgment that petitioner was qualified for allotment in severalty; that an allotment had been made to him; that he was entitled to a trust patent therefor; and that a copy of the judgment be certified to the Secretary of the Interior as provided by the Jurisdictional Act of August 15, 1894, 28 Stat. 286, as amended, 25 U. S. C. sec. 345.

On November 29, 1941, respondent filed a motion for dismissal or, in the alternative, for summary judgment based on the affidavits thereto attached and the files, records, pleadings, and further proceedings in the *St. Marie* case (R. 48–50). Attached to the motion was an affidavit by Carl Spinner, Principal Clerk of the Mission Indian Agency, in which it was stated that examination of the records of that Indian Agency showed that the Secretary of the Interior had never approved any selections for allotment on the Agua Caliente or Palm Springs Indian reservation but had disapproved them (R. 50–51).[9] Also attached to the motion was a certificate by E. J. Armstrong, Acting Commissioner of Indian Affairs, in which it was certified that no selections for allotment on that reservation had ever been approved by the Secretary of the Interior (R. 52). In support of the motion, respondent alleged that the subject matter and purpose of petitioner's complaint were the same as those of the complaint in the case of *St. Marie* v. *United States, supra,* and that the only new matter concerned an alleged estoppel, which raised no justiciable issues because the United States is not bound by the un-

[9] The Department of the Interior advises that the Secretary of the Interior disapproved the selections for allotments shown on the 1923 schedule, and that he has never approved those shown on the 1927 schedule.

authorized statements and acts of its officers and agents.

On January 26, 1942, summary judgment was entered on the motion (R. 59–60). On June 30, 1943, the judgment was affirmed by the circuit court of appeals (R. 76–77).

SUMMARY OF ARGUMENT

I

A. It rests in the complete discretion of the Secretary of the Interior whether or not allotments shall be made on the Palm Springs Reservation. Sections 4 and 5 of the Act of January 12, 1891, 26 Stat. 712 (Appendix, *infra*, pp. 54–56) contemplate three steps in the making of allotments on that reservation: (1) an opinion by the Secretary as to the capacity of the Indians to receive allotments; (2) a method or procedure for making such allotments; and (3) approval of the allotments by the Secretary. Each of these steps is under the control and rests in the discretion of the Secretary. The 1891 Act is silent as to the method or manner of making allotments. Therefore, it must be presumed that Congress intended the Secretary, as the agent named to administer the legislation and as head of the Government in charge of Indian affairs, to have authority to prescribe the requisite procedure. R. S. sec. 441, 5 U. S. C. sec. 485; *West* v. *Hitchcock*, 205 U. S. 80, 85; *Parker* v. *Richard*, 250 U. S. 235, 240;

Sunderland v. *United States*, 266 U. S. 226, 234–235; *Mitchell* v. *United States*, 22 F. (2d) 771, 772 (C. C. A. 9). Cf. *Cosmos* v. *Gray Eagle*, 190 U. S. 301; *United States* v. *Morrison*, 240 U. S. 191, 210–211; *United States* v. *Morehead*, 243 U. S. 607. Section 4 of the 1891 Act provides that the Secretary *may* cause allotments to be made, thus implying that Congress intended the Secretary to have full discretionary authority. This will be deemed to be the case, unless the purpose or object of the 1891 Act warrants a contrary conclusion. *Farmers Bank* v. *Fed. Reserve Bank*, 262 U. S. 649, 662–663; *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, 635–636.

The 1891 Act discloses no positive mandate to the Secretary to make allotments. The provisions and legislative history of the statute reflect no pledge of faith or guarantee on the part of the United States that allotments would be made. S. Rep. No. 74, 50th Cong., 1st sess.; H. Rep. No. 3251, 51st Cong., 2d sess. On the contrary, they fairly show that the underlying policy of the Mission Indian legislation was no more than one of extending the protection of the Government over the Mission Indians. *Ibid.* It cannot be said that this policy of protection justifies the inference that the Secretary was intended to have no discretionary authority as to the making of allotments on the Mission reservations.

B. The Act of March 2, 1917, 39 Stat. 969, 976 (Appendix, *infra*, p. 58) does not repeal the discretionary authority of the Secretary of the Interior under the 1891 Act. It was proposed by the Secretary of the Interior himself in order to enable him to put into effect on the Mission reservations a more equitable and suitable plan of making allotments. H. Rep. No. 397, 63d Cong., 2d sess., pp. 1, 3; Letter, dated January 7, 1916, from the Secretary to the Chairman of the Senate Indian Affairs Committee (reproduced in the Appendix, *infra*, p. 62); S. Rep. No. 962, 64th Cong., 2d sess., p. 15; 54 Cong. Rec., pt. 2, 64th Cong., 2d sess., p. 2063. See, also, Hearings, S. Comm., Indian Affairs, S. 1424 and 2589, 75th Cong., 1st sess., p. 157. The terms of the Act purport only to change the areas in which the Secretary might make allotments, and do not reveal any intent to repeal the discretionary authority vested in the Secretary under the 1891 Act. Under the familiar rule against implied repeals, the Act should not be construed as intended to accomplish any such purpose. *United States* v. *Burroughs*, 289 U. S. 159; *Posadas* v. *National City Bank*, 296 U. S. 497. See opinion, dated April 8, 1937, by Acting Solicitor Kirgis of the Interior Department, Hearings, S. Comm., Indian Affairs, S. 1424 and 2589, 75th Cong., 1st sess., p. 157. That this Act has not been administratively interpreted as not imposing a mandatory duty on the Secretary to make allot-

ments on Mission reservations is shown by the fact that allotments have been made on only eight out of the twenty-seven Mission reservations which were unallotted on March 2, 1917. Hearings, S. Comm., Indian Affairs, S. 1424 and 2589, 75th Cong., 1st sess., pp. 142–153.

C. The appointment of Wadsworth as allotting agent, the listing of selections for allotment, the issuing of certificates, and the scheduling and certifying of the selections to the Secretary of the Interior are not equivalent to a determination by the Secretary to exercise his discretion and make allotments on the Palm Springs Indian Reservation. The Secretary manifestly intended to exercise his discretion as to whether allotments should be made on that reservation after and not before those acts were performed. He must be deemed to have planned to form his opinion as to the capacity of the Palm Springs Indians for allotments at the time when the schedule was submitted for his approval and not earlier. It is only natural to suppose that he sent Wadsworth out to the Mission reservations to do necessary preliminary work and to obtain information essential to the formation of an intelligent opinion on his part as to the capacity of the Mission Indians for allotment. Any contrary view would seem wholly inadmissible because it would mean that the Secretary, merely by appointing Wadsworth, exhausted his discretion and thereafter could not decide not

to make allotments on any of the Mission reservations.

It would be erroneous to conclude that when the 1927 schedule was submitted for his approval, the Secretary had no discretionary power to decide that no allotments should be made on the Palm Springs Indian Reservation, merely because he had instructed Wadsworth to follow and Wadsworth had followed the provisions of the General Allotment Act, as amended (Appendix, *infra*, p. 59–62 in listing and scheduling selections for allotment on that reservation. See Wadsworth's certificate appended to the 1927 schedule (*supra*, p. 7). Prior to the Act of March 2, 1917, *supra*, pp. 16–17, the Secretary had not made the General Allotment Act, as amended, applicable on Mission reservations. And the 1917 Act only required him to use the method or manner of making allotments specified in the General Allotment Act, as amended (see *supra*, p. 59). Cf. *Fairbanks* v. *United States*, 223 U. S. 215. Accordingly, notwithstanding that in accordance with the mandate of the 1917 Act he thereafter instructed Wadsworth to follow the method or manner of making allotments set forth in the General Allotment Act, as amended, he should be regarded as having reserved the right to decide, in his discretion, whether he would approve the 1927 schedule of selections when it was submitted to him, and whether he would make allotments on the Palm Springs Reservation.

D. Even if it be said that the Secretary's discretionary authority under the 1891 Act was not complete, or that if he had such discretion, it was repealed by the 1917 Act, still the Secretary of the Interior has a power of approval over allotments on the Palm Springs Reservation by virtue of section 5 of the 1891 Act (Appendix, *infra*, p. 55), which, obviously, is unaffected by the 1917 Act. This power of approval is no mere formality. It comprehends a wise exercise of discretion consistent with the provisions and purpose of the Mission Indian legislation. R. S. sec. 441, 5 U. S. C. sec. 485; *Williams* v. *United States*, 138 U. S. 514, 524; *Knight* v. *U. S. Land Association*, 142 U. S. 161, 181; *Northern Pac. Ry. Co.* v. *McComas*, 250 U. S. 387, 393; *Payne* v. *United States*, 269 Fed. 198, 200–201 (App. D. C.); *Lemieux* v. *United States*, 15 F. (2d) 518, 521 (C. C. A. 8); *Mitchell* v. *United States*, 22 F. (2d) 771, 772 (C. C. A. 9). Cf. *United States* v. *Wilbur*, 283 U. S. 414, 419; *Chippewa Indians* v. *United States*, 301 U. S. 358, 378–379.

As will appear below, the Secretary has determined that it would be inequitable and detrimental to the Palm Springs Band of Indians as a whole to approve any allotments on their reservation. No provision of the Mission Indian legislation precludes the Secretary from taking into consideration the equities and needs of the Band as a whole in determining whether to approve any

allotments. Indeed, the basic purpose and policy of that legislation (see *supra*, pp. 14–15), indicate that the considerations of administrative policy underlying his actions are wholly proper and authorized by law. The Secretary should not be compelled to carry through a plan of allotment in severalty which in his judgment will operate contrary to the best interests of the Palm Springs Band of Indians, but he should be permitted to stay his hand and seek a plan which would be more in the interest of that Band.

E. In view of the great increase in value of the selected lands by reason of proximity to the the city of Palm Springs, the Secretary of the Interior judges that it would be inequitable and unjust to the Palm Springs Band of Indians to carry through any plan of allotment on their reservation. He believes that that increase in value, which he regards as essentially a tribal asset, presents an administrative problem which should be solved in the interests of the Band as a whole. On the facts involved, it would appear that the Secretary's judgment in favor of the Band as a whole is wise. And it is in no way unfair to those who have made selections for allotment. Any interest they have in the lands selected is not a vested interest and is both subsequent and subordinate to that of the Band. They will participate along with the others of the

Band in the benefits resulting from the solution which will be made of the Palm Springs Indian problem, and it is not improbable that they will benefit more if no allotments are made than they would otherwise.

II

Viewing the allegations of the complaint in their entirety, it fairly appears that petitioner was aware that his only right, if any, to the lands involved was a possessory one and, especially in view of the allegation (R. 9) that he had occupied and substantially improved the lands long prior to issuance of the certificates of selection, that the alleged acts and representations were not the motivating cause inducing him to erect thereon "buildings, and other permanent structures and improvements * * * suitable for use for residential, commercial, and business purposes" (R. 12–13). For this reason alone, petitioner's contention regarding estoppel is not well-founded.

In any event, his plea of estoppel is not well made as against the United States which is not bound by the unauthorized acts of its officers and agents. *Utah Power & Light Co.* v. *United States*, 243 U. S. 389, 409; *Yuma Water Assn.* v. *Schlecht*, 262 U. S. 138, 144; *United States* v. *San Francisco*, 310 U. S. 16, 31–32. The alleged acts and representations relied upon are outside of and inconsistent with the authority of the Secretary of the Interior under the Mission Indian legislation,

who is thereunder required not to approve the selections for allotment on the Palm Springs Reservation when to do so would in his judgment be inequitable and inimical to the interests of the Palm Springs Band of Indians as a whole. Petitioner's assertion that the alleged acts and representations relied upon amount to an administrative interpretation or rise to the dignity of a rule or regulation under the Mission Indian legislation is plainly unfounded, since it clearly appears that the Secretary's understanding is to the contrary. Cf. *United States* v. *San Francisco*, 310 U. S. 16, 31–32.

ARGUMENT

Introduction.—The basic jurisdictional Act of August 15, 1894, 28 Stat. 286, 305, as amended, 25 U. S. C. sec. 345 (set forth in the Appendix, *infra*, p. 59) makes provision for judicial determination of claims by Indians of rights to an allotment of land. It provides that a judgment or decree in favor of any such claimant "shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him." This Act presupposes that an allotment has been made but has not been allowed or approved by the Secretary of the Interior and empowers the court, upon a determination that the disallowance of the allotment is unlawful, to allow or approve the allotment as the Secretary should have done. Cf.

Hy-yu-tse-mil-kin v. *Smith*, 194 U. S. 401; *United States* v. *Payne*, 264 U. S. 446; *Bonifer* v. *Smith*, 166 Fed. 846 (C. C. A. 9); *Leecy* v. *United States*, 190 Fed. 289 (C. C. A. 8). It does not authorize the court, however, to make an allotment or to determine whether an allotment should be made. Cf. *Chase, Jr.* v. *United States*, 256 U. S. 1; *Woodbury* v. *United States*, 170 Fed. 302 (C. C. A. 8); *Lemieux* v. *United States*, 15 F. (2d) 518 (C. C. A. 8); *Mitchell* v. *United States*, 22 F. (2d) 771 (C. C. A. 9); 55 Interior Decisions 295; 57 *id.* at p. 13.

In *St. Marie* v. *United States*, 24 F. Supp. 237, affirmed, 108 F. (2d) 876 (C. C. A. 9), certiorari denied, 311 U. S. 652, involving eighteen claims to allotments of land on the Palm Springs Indian Reservation, the Government contended and it was held that no allotments of land had been made on that reservation, and that steps which had been taken looking toward the allotment of lands thereon were merely preliminary and did not amount to the making of allotments. Thus the question did not arise in that case, and there was no occasion to decide, whether if the case were truly one where allotments had been made but disallowed by the Secretary, the approval of the Secretary had been withheld for legally sufficient reasons. In the instant case, the Government moved (R. 48–54) for summary judgment based on the record in the *St. Marie* case and on affidavits showing that there

had never been an approval by the Secretary of the Interior of the selections for allotments involved. And, consistent with its own decision and that of the circuit court of appeals in the latter case, the district court granted summary judgment for the Government. The court below affirmed this action. Hence, the record here does not fully disclose the reasons why the Secretary has not made allotments on the Palm Springs Reservation. It is beyond question, however, that, in not making allotments on that reservation, the Secretary has been motivated by considerations of policy which are wholly proper and which sustain his action.

I

PETITIONER HAS NO RIGHT TO ALLOTMENTS IN SEVERALTY ON THE PALM SPRINGS INDIAN RESERVATION

Before petitioner can be said to have rights to allotments in severalty on the Palm Springs Reservation, three factors must be established: (1) that the Secretary of the Interior has no discretionary authority as to whether and when allotments shall be made on that reservation; (2) that, because he appointed a Special Allotting Agent for the Mission Indian Reservation and authorized and permitted selections for allotment to be made on that reservation, certificates therefor to be issued, and schedules of allotments to

be prepared and certified to him, he has made allotments in severalty thereon; and (3) that if he has made allotments thereon, he has withheld his approval thereof without lawful reason.

We contend that the Secretary of the Interior does have discretionary authority as to whether and when allotments shall be made on that reservation; that so far he has not made allotments thereon; and that, therefore, petitioner's claim herein must fail because he cannot establish both of the first two essential grounds enumerated above. Although not material to support this contention, in connection therewith we will show that the Secretary does have sound reason for not exercising, in favor of petitioner or any of the Palm Springs Indians, his discretionary authority as regards the making of allotments. We further contend that even if the Secretary has no complete discretion as to the making of allotments, he does have authority, by virtue of his power of approval over allotments, to withhold his approval thereof for good and sufficient reason, and that he does have lawful and proper reason for not approving any allotments on the Palm Springs Indian Reservation.

A. *The Act of January 12, 1891, vests discretionary authority in the Secretary of the Interior as to the making of allotments.*—Section 4 of the Act of January 12, 1891, 26 Stat. 712 (Appendix, *infra*, pp. 54–55), provides that whenever any of

the Indians residing upon any of the Mission reservations "shall, *in the opinion of the Secretary of the Interior,* be so advanced in civilization as to be capable of owning and managing land in severalty, the Secretary of the Interior *may* cause allotments to be made to such Indians, out of the land of such reservation" in specified quantities. (Italics added.) Section 5 of that Act (Appendix, *infra,* p. 55) provides that "upon the approval of the allotments provided for in the preceding section by the Secretary of the Interior he shall cause" individual trust patents to be issued therefor.

These two sections contemplate that three steps shall be taken before an allotment is made: (1) the formation of the requisite opinion by the Secretary of the Interior; (2) the establishment and fulfillment of the requirements of a mechanical procedure for making of allotments; and (3) the approval of the allotments by the Secretary of the Interior. The first mandatory requirement of these sections—the provision of section 5 that trust patents "shall" be issued—comes into play only after the final step, approval of the allotment by the Secretary of the Interior, has taken place. Each of these three steps is under the control and rests in the complete discretion of the Secretary.

This is so, first, because the legislation is completely silent as to the manner or method by which allotments shall be made. Since an allotment procedure would be needed, and since Congress designated the Secretary to make the allotments, it is natural to suppose that Congress intended him to have authority to define the necessary procedure. Also, where, as here, the legislation requires it, it is presumed that Congress intended the Secretary, as head of the Government Department in charge of Indian affairs to have authority to prescribe requisite administrative procedure. R. S. sec. 441, 5 U. S. C. sec. 485; *West* v. *Hitchcock*, 205 U. S. 80, 85; *Parker* v. *Richard*, 250 U.S. 235, 240; *Sunderland* v. *United States*, 266 U. S. 226, 234–235; *Mitchell* v. *United States*, 22 F. (2d) 771, 772 (C. C. A. 9). Cf. *Cosmos* v. *Gray Eagle*, 190 U. S. 301; *United States* v. *Morrison*, 240 U. S. 192, 210–211; *United States* v. *Morehead*, 243 U. S. 607.

In this respect, the Mission Indian Act of January 12, 1891 (Appendix, *infra*, pp. 52–58) is in complete contrast to the provisions of the General Allotment Act of February 8, 1887, 24 Stat. 388.[10] They explicitly provide who shall make and how he shall make a selection for allotment; that the allotments "shall be made" by specified

[10] The contrasted provisions of the General Allotment Act of 1887 are set forth in the Appendix, *infra*, pp. 59–62.

allotting agents; that the allotments shall be certified to the Secretary of the Interior by these agents; and that upon approval of the allotments provided for in the Act, the Secretary shall issue trust patents. Thus, in the General Allotment Act, Congress exercised its own judgment and discretion and prescribed in full detail how and when allotments should be made, leaving no room for the exercise of judgment and discretion by the Secretary of the Interior.

That the Mission Indian legislation does vest discretionary authority in the Secretary is evident, secondly, because section 4 of the 1891 Act uses merely permissive language; it states that he *may* cause allotments to be made. From this, the inference is that Congress intended the Secretary to have full discretionary authority to make or not to make allotments as he deemed fit. This will be deemed to be the case, unless the purpose or object of the 1891 Act compels a contrary conclusion. *Farmers Bank* v. *Fed. Reserve Bank,* 262 U. S. 649, 662–663; *Moore* v. *Illinois Central R. Co.,* 312 U. S. 630, 635–636. And that the Mission Indian Act of 1891 requires no contrary conclusion seems quite clear. The Act of 1891 discloses no policy or purpose inexorably to require the Secretary to make allotments. In the first place, nothing in the legislative history or the provisions of the statute (Appendix, *infra,* pp. 52–58) reflects a pledge of faith or guarantee on the part of the United

States that allotments in severalty would be made. There was no treaty with the Mission Indians which so obligated the United States. Nor was there any promise from the United States to them that allotments in severalty would be made.[11] S. Rep. No. 74, 50th Cong., 1st sess.; H. Rep. No. 3251, 51st Cong., 2d sess. And in the second place, the provisions and legislative history of the 1891 Act fairly show that the underlying policy of the legislation was no more than one of extending the protection of the Government over the Mission Indians. The policy was to settle the Mission Indians on reservations, to protect them from interference with their occupancy of the lands of those reservations, and at the expiration of a prescribed period of time to relinquish either to the band of Mission Indians or to individual members thereof, as the operation of the allotment provisions of section 4 of the Act should then require, the title of the United States to the lands they occupied. S. Rep. No. 74, 50th Cong., 1st sess.; H. Rep. No. 3251, 51st Cong., 2d sess. This policy of protection is wholly unlike the policy of the General Allotment Act of February 8, 1887, 24 Stat. 388, and related or similar legislation, which was, through the very medium of allotment in

[11] For contrasting cases where the United States pledged its faith or made a promise of allotments, see *Halbert* v. *United States*, 283 U. S. 753; *Chase, Jr.* v. *United States*, 256 U. S. 1.

severalty, to seek the added objectives of dissolving tribal organization, breaking up the reservation system, and assimilating Indians to the white civilization surrounding them. Cohen, *Handbook of Federal Indian Law* (1942), pp. 206–233. It can hardly be said that the policy of protection bespoken by the Mission Indian Act of 1891 clearly compels the view that the Secretary was not intended to have discretionary authority thereunder in regard to the making of allotments.

B. *The Act of March 2, 1917, does not repeal the discretionary authority vested in the Secretary of the Interior by the 1891 Act.*—This Act, 39 Stat. 969, 976 (Appendix, *infra*, p. 58) originated from the then Secretary of the Interior. He found that on the Morongo Mission Indian Reservation the more influential and aggressive Indians were occupying the larger quantities of the best land, to the exclusion of the more timid Indians. In this situation the Secretary of the Interior felt that the plan of allotment provided by section 17 of the Act of June 25, 1910, 36 Stat. 859, would operate more equitably than the one provided by section 4 of the Mission Indian Act of 1891. Also, he thought that it would be a wiser and better plan to provide, as in the 1910 Act, for allotments to each member of the Morongo band, rather than, as in section 4 of the 1891 Act, for heads of families and adult single persons, in order to eliminate injustice to orphan children, married women, and divorced

wives and their children. See H. Rep. No. 397, 63d Cong., 2d sess., pp. 1, 3; Letter, dated January 7, 1916, from the Secretary to the Chairman of the Senate Indian Affairs Committee.[12] Accordingly, he proposed several bills to Congress for the purpose of permitting the use of the allotment provisions of the 1910 Act on the Morongo Reservation. *Ibid.* Later, he sought authority to apply those provisions on the Mission Indian reservations generally, and such authority was finally provided by the Act of March 2, 1917. S. Rep. No. 962, 64th Cong., 2d sess., p. 15; 54 Cong. Rec., pt. 2, 64th Cong., 2d sess., p. 2063. See, also, Hearings, S. Comm., Indian Affairs, S. 1424 and 2589, 75th Cong., 1st sess., p. 157. The terms of the 1917 Act (Appendix, *infra*, p. 58) purport only to change the areas that the Secretary may allot. The historical background of the Act indicates that there was no purpose to take away from the Secretary the discretionary authority he had under section 4 of the 1891 Act. And under the familiar rule against implied repeals, it should not be inferred that the Act was intended to accomplish any such purpose. *United States* v. *Burroughs*, 289 U. S. 159; *Posadas* v. *National City Bank*, 296 U. S. 497. See opinion, dated April 8, 1937, of Acting Solicitor Kirgis of the Interior Department, Hearings, S. Comm., Indian Affairs, S. 1424 and 2589, 75th Cong., 1st sess., p. 157.

[12] Reproduced in the Appendix, *infra*, p. 62.

Petitioner asserts (Pet. 10–11) that the 1917 Act has been administratively interpreted as mandatorily requiring that allotments be made on the Mission Indian Reservations. He cites Wadsworth's certificate appended to the 1927 schedule which recites that "the allotments shown hereon were made in accordance with the provisions of the Act of Congress of February 8, 1887 (24 Stat. L. 388), as amended by the Act of June 25, 1910 (36 Stat. L. 855), and supplemented by the Act of March 2, 1917 (39 Stat. L. 969–76)."[13] It is plain, however, that this certificate in no way proves or even tends to show an administrative understanding that the 1917 Act required the Secretary to make allotments. Petitioner also refers to two letters, one from the Secretary of the Interior to the Attorney General and another from the latter to the United States District Attorney at Los Angeles. Those letters touch upon the subject of whether or not the 1917 Act is mandatory, but they hardly reflect any administrative interpretation, understanding, or practice; they simply moot a point of law. The best proof of the administrative viewpoint lies in the fact that subsequent to the 1917 Act the administrative authorities have made allotments on only eight out of the twenty-seven Mission reservations which were unallotted on March 2, 1917. Hear-

[13] As to Wadsworth's instructions, see letter dated January 26, 1922, set forth in the Appendix, *infra*, p. 66.

ings, S. Comm., Indian Affairs, S. 1424 and 2589, 75th Cong., 1st sess., pp. 142–153.

C. *The Secretary of the Interior has not exercised his discretionary authority to make allotments on the Palm Springs Reservation.*—What has been done so far on the Palm Springs Reservation—the appointment of Wadsworth, the listing of selections, the issuing of certificates, and the scheduling and certifying of the selection to the Secretary—does not amount to the making of allotments so that it must now be said that the Secretary has exercised his discretion to determine whether allotments should be made on that reservation and has made allotments thereon. As shown, *supra,* pp. 25–30, sections 4 and 5 of the 1891 Act (Appendix, *infra,* pp. 54–56) contemplated three steps: (1) an opinion; (2) an allotment procedure; and (3) approval of the allotments. That the Secretary intended to exercise his discretionary power at the time of the last step and not before, and so may not be deemed already to have exercised his discretionary authority and made allotments on the Palm Springs Reservation, would seem clearly to be true, because he can only be regarded as having intended to form the requisite opinion at time of approval and not earlier. The Secretary appointed Wadsworth as allotting agent at large for the Mission reservations, and there are thirty such reservations. The opinion required of the Secretary by section 4 of the 1891 Act is whether "any of the Indians re-

siding upon any" of those reservations is so advanced as to be capable of owning and managing land in severalty. The only natural supposition is that the Secretary appointed Wadsworth and sent him out to those reservations for the purpose of doing necessary preliminary work and of obtaining the information and particulars which would be essential to the intelligent formation by the Secretary of the opinion required of him. Any contrary view would seem wholly inadmissible because it would mean that merely by appointing Wadsworth the Secretary exhausted his discretionary authority and thereafter could not decide whether any particular Mission reservation should be allotted. Compare the opinion required of him with that required of the President by section 1 of the General Allotment Act of 1887 (Appendix, *infra*, p. 60). That section provides that the President is authorized "whenever in his opinion any reservation or part thereof is advantageous for agricultural and grazing purposes" to cause the reservation to be surveyed and to allot the lands thereof. The opinion there required of the President would naturally precede any allotment process, but the opinion required of the Secretary by section 4 of the 1891 Act would naturally come at the end of an allotment process. Accordingly, it must be deemed that the work done and the acts performed by Wadsworth were wholly preliminary and that when the schedules prepared by Wadsworth were submitted the

Secretary could then decide in his discretion that the Palm Springs Reservation should not be allotted.

Nor may it be deemed, because as shown by Wadsworth's certificate appended to the 1927 schedule (*supra*, p. 7), the Secretary instructed [14] the allotting agent to follow and Wadsworth did follow the allotment provisions of the General Allotment Act of February 8, 1887, 24 Stat. 388, as amended by the Act of June 25, 1910, 36 Stat. 855, and supplemented by the Act of March 2, 1917, 39 Stat. 969, 976, that the Secretary of the Interior determined that the members of the Palm Springs Band of Indians were capable of owning and managing land in severalty, and made the allotment provisions of the General Allotment Act, as amended, effective on their reservation, in such manner that he deprived himself of any discretionary power to determine that allotments should not be made on that reservation, when the schedule of selections for allotments thereon was certified to him for his approval. Prior to March 2, 1917, the Secretary of the Interior had not made the allotment provisions of the General Allotment Act, as amended, applicable to Mission Indian reservations. And, as has been seen, *supra*, pp. 30–31, he requested authority from Congress to use those provisions because he believed they would permit the application to the Mission reservations

[14] The instructions appear in the Appendix, *infra*, p. 66.

of a more equitable and satisfactory plan of allotment. By the Act of March 2, 1917, 39 Stat. 969, 976 (Appendix, *infra*, p. 58), Congress required him to use those provisions on the Mission reservations. But it did not thereby put those provisions in force with respect to Mission reservations, in such manner as to deprive the Secretary of the Interior of his discretionary authority under section 4 of the Mission Act of 1891 to determine whether allotments should be made on a particular Mission reservation and to make the General Allotment Act, as amended, controlling as to the right of Mission Indians to allotments on their reservations. Compare *Fairbanks* v. *United States*, 223 U. S. 215, where this Court said (pp. 223–224) that the Steenerson Act of 1904 was controlling as to kind of land to be allotted on the White Earth Indian Reservation in Minnesota, as the reference therein to the General Allotment Act of 1887 only went to the manner of allotment. The Secretary was left free to determine, in his discretion, how and when allotments should be made on the Mission Indian reservations. And the same considerations which were indicated above require the view, notwithstanding that he instructed Wadsworth to follow the provisions of the General Allotment Act, as amended, and Wadsworth did follow those provisions, that the Secretary reserved the power to decide, in his discretion, that he would not approve the schedule

of selections submitted to him and that no allotments should be made on the Palm Springs Reservation.

The complaint in paragraphs II and III (R. 3, 4) in substance alleges that, on or about June 7, 1921, the Secretary determined, in his opinion, that the Palm Springs Band of Indians, including petitioner, were capable of owning and managing allotments, that he appointed Wadsworth to make allotments on the Palm Spring Reservation, and that thereafter Wadsworth did make allotments to that Band of Indians, including petitioner. Accordingly, it is evident that petitioner adopts the theory that the Secretary completely exercised his discretionary power under the Mission Indian legislation when he appointed Wadsworth, thus relinquishing all further discretionary power of control over the making of allotments, and that thereafter Wadsworth with full delegated power to do so made the allotments. The reasons set forth in the preceding paragraph make it plain that this theory is a highly improbable one. But, however unlikely, it would be supportable if it were true that the Secretary of the Interior did in fact determine, on or about June 7, 1921, that, in his opinion, the Palm Springs Band of Indians, including petitioner, had the requisite capacity. The judgment of the district court conclusively determines, however, that such was not the case.

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The complaint pleaded that the Secretary had made such a determination, thus alleging a fact which the Government aeknowledges is a material one. The Government by motion for summary judgment based on the record in the *St. Marie* case (R. 48–49) raised the question whether the fact thus alleged presented any genuine issue. The record in the *St. Marie* case showed (pp. 23–24, Fdg. II) that the district court after trial had there found that it is not true that the Secretary of the Interior had determined, on June 7, 1921, or at any other time, that in his opinion the Palm Springs Band of Indians were so advanced in civilization as to be capable of owning or managing land in severalty; that it is not true that he caused allotments to be made to any of the Indians of that Band or made allotments of the lands of their reservation; that it is not true that he caused to be prepared any *official* schedule of allotments for the Palm Springs reservation; and that it is not true that Wadsworth was vested with authority of law or otherwise to make allotments of lands or that he did allot any lands on that reservation. [Italics supplied.] The *St. Marie* case was in the nature of a test case for the purpose of having it judicially determined whether or not the Palm Springs Reservation is an allotted reservation. The present case had the same purpose. The situation of petitioner in this case is the same as was that of the Indians involved in the *St. Marie* case.

Both cases turn upon the same facts and the same law. Upon the motion for summary judgment in this case, it was incumbent upon the district court to examine into the genuineness of the issue tendered by the allegation of the complaint that the Secretary had determined the Palm Springs Band of Indians to be capable of holding allotments. And its judgment granting that motion implies a finding that that allegation presented no genuine issue. Hence, it is to be taken here as established that the Secretary has never determined that any Palm Springs Indians are capable of owning and managing allotments in severalty.[15]

D. *Under his power of approval in section 5 of the 1891 Act, the Secretary may lawfully withhold his approval of allotments on the Palm Springs Reservation.*—Whether it be said that the Secretary has no complete discretionary authority under section 4 of the 1891 Act, or that if he had, it was repealed by the 1917 Act, still section 5 of

[15] Petitioner states (Pet. 7) that the fact he alleged is a well-pleaded fact which is admitted by a motion for summary judgment, but he is clearly mistaken. F. R. C. P. 56. As to the propriety of the district court's grant of summary judgment on the basis of knowledge obtained from its own public records, see: Calif. Code of Civil Procedure (Deering 1937) sec. 1875; 3 Moore's Federal Practice (1938) secs. 56.03, 56.04, pp. 3183–3185; *Fletcher* v. *Evening Star Newspaper Co.*, 114 F. (2d) 582, 586–587 (App. D. C.), certiorari denied, 312 U. S. 694; *United States* v. *City of Philadelphia, etc.*, Nos. 8354, 8404, C. C. A. 7, decided January 7, 1944.

the 1891 Act—the provisions of which, of course, are not affected by anything in the 1917 Act—requires his approval of allotments on Mission reservations. That approval is no mere formality. It comprehends a wise exercise of judgment consistent with the provisions and purpose of the Mission Indian legislation. R. S. sec. 441, 5 U. S. C. sec. 485; *Williams* v. *United States*, 1[illegible] U. S. 514, 524; *Knight* v. *U. S. Land Association*, 142 U. S. 161, 181; *Northern Pac. Ry. Co.* v. *McComas*, 250 U. S. 387, 393; *Payne* v. *United States*, 269 Fed. 198, 200-201 (App. D. C.); *Lemieux* v. *United States*, 15 F. (2d) 518, 521 (C. C. A. 8); *Mitchell* v. *United States*, 22 F. (2d) 771, 772 (C. C. A. 9). Cf. *United States* v. *Wilbur*, 283 U. S. 414, 419; *Chippewa Indians* v. *United States*, 301 U. S. 358, 378–379.

As will appear below, the Secretary has concluded that it would be inequitable and detrimental to the Palm Springs Band of Indians as a whole to approve any allotments on their reservation. No provision of the Mission Indian legislation precludes the Secretary from taking into consideration the equities and needs of the Band as a whole in determining whether to approve any allotments. Nor does the basic purpose and policy of that legislation (see *supra*, pp. 52–58). Thus, it would seem that the Secretary is under no compulsion to carry through a plan of allotment in severalty which in his judgment will

operate contrary to the best interests of the Palm Springs Band of Indians, but may stay his hand and seek a plan which would be more in the interest of that Band.

E. *The Secretary of the Interior acted properly in not making allotments on the Palm Springs Reservation.*—The Secretary of the Interior has withheld his approval of the selections for allotment because in his judgment circumstances require that the Agua Caliente or Palm Springs Indian Reservation be held in a tribal status rather than allotted in severalty. Hearings, S. Comm., Indian Affairs, S. 1424 and 2589, 75th Cong., 1st sess., pp. 129–132, 143, 154, 162. As shown by the data contained in the hearings cited and other material which will be cited herein, three factors combined to cause him to form this judgment. In the first place, many of the Indians on that reservation oppose any plan of allotment. This opposition existed when the 1923 schedule of selections for allotment was presented for approval and led the Secretary to direct that a new schedule be prepared listing only those Indians who wanted allotments.[16] Even after the 1927 schedule was prepared showing only voluntary

[16] Superintendent Ellis' letter to Commissioner of Indian Affairs, dated November 26, 1923; Commissioner Burke's letter to the Secretary of the Interior, dated December 22, 1926; and Assistant Commissioner Meritt's letter to Wadsworth, dated January 8, 1927, set forth in the Appendix, *infra*, at p. 70, p. 73, and p. 76, respectively.

selections, opposition to allotment in severalty continued among the majority of the Indians. Secondly, while the Mission Indian legislation contemplated allotment for agricultural purposes, the physical situation on the reservation was not suitable to allotment for such use because of a lack of water for irrigation. And, finally, the city of Palm Springs having developed into a famous winter resort, much of the area listed for allotment had become very valuable for resort purposes and development by reason of close proximity to the city.[17] This value could be very great if the land were retained in a tribal status and dealt with as a whole as opportunity and the best interests of the tribe might dictate, but would be largely destroyed if a program of allotment in severalty were consummated. It was felt that essentially this value was a tribal asset, that the tribe as a whole had a just and equitable claim to it, and that it would be inequitable to carry out a program of allotment in severalty which would result in this valuable land being divided among a few members of the tribe who had made selections at a time when the land had no such special value and the remaining members of the tribe being not only denied any share in it but also left to choose from land of no particular value for their own allotments.

[17] Superintendent Ellis' letter to the Commissioner, dated August 2, 1928, set out in the Appendix, *infra*, p. 79.

In 1935, when it seemed likely that a long-term lease of the reservation land could be made on terms favorable to the tribe, the Secretary recommended to Congress a bill to empower him to make such a lease. The bill proposed to authorize a ninety-nine year lease of all or part of the reservations, reserving to the tribe all mineral rights and such lands and waters as the tribe might select for its own use. The lease was to guarantee the tribe "a minimum cash payment annually equal to the net revenue the Indians now derive from the use or rental of the property to be leased," and was to contain provisions granting the tribe "a participating interest of at least 20 per centum of the gross revenues derived by the lessee or lessees from ground subleases and at least 10 per centum of all other revenues derived by the lessee or lessees from the land leased." The revenues under the lease were to be deposited in the Treasury at interest of four per cent per annum and expended on behalf of the tribe as Congress should direct. The bill was reported favorably by the House Committee on Indian Affairs, and a similar one was reported favorably by the Senate Committee on Indian Affairs, but the two bills failed of enactment. H. Rep. No. 1521, 74th Cong., 1st sess.; S. Rep. No. 1201, 74th Cong., 1st sess. See also Hearings, S. Comm., Indian Affairs, S. 1424 and 2589, 75th Cong., 1st sess., pp. 2–7.

In 1937, the Secretary recommended passage of a bill to authorize sale of lands on the Palm Springs reservation. The bill proposed to authorize the sale of such of the reservation lands as the Secretary might deem advisable and in such portions as he might deem desirable in order to secure the best possible price, reserving water rights to the tribe, together with sufficient land to provide homesites for the Indians. No sale was to be made unless the selling price was consented to by a majority of the adult members of the tribe or a board of disinterested appraisers appointed by the Secretary, after hearing and investigating any objections the tribe might have to the sale price, determined the objections to be unreasonable or capricious and the sale price to be adequate. The proceeds from any sale were to be deposited in the Treasury to the credit of the tribe and at annual interest of four percent. The Secretary was to be authorized to pay individual Indians from the proceeds of any sale the reasonable value of any improvements they might have on the lands sold. He was also to be authorized to expend not to exceed $100,000.00 in the building of homes and community buildings and for general use in rehabilitating individual members of the tribe. Hearings, H. Comm., Indian Affairs, H. R. 7450, 75th Cong., 3d sess., pp. 1–6. This bill also failed of enactment.

In 1937, also, the Secretary recommended enactment of legislation (See proposed bill, *supra*,

p. 9, n. 8) repealing the portion of the Act of March 2, 1917, 39 Stat. 969, 976, relative to the making of allotments on the Mission Indian reservations. This bill dealt with all of the Mission Indian reservations, and its passage was recommended principally because the Mission Indians in general were opposed to allotting of their reservations in severalty and the governmental policy as to the making of allotments on Indian reservations had been modified.[18] The bill contained a clause saving vested rights to allotment, if any, of Mission Indians. It was supported by the Mission Indians generally. The principal opposition to it was from the attorney for the Indians on the Palm Springs Reservation, whose selections for allotment were involved in the then pending *St. Marie* case. The bill was reported favorably by the Senate Committee on Indian Affairs but was not enacted. S. Rep. No. 1238, 75th Cong., 1st sess.; Hearings, S. Comm., Indian Affairs, S. 1424 and 2589, 75th Cong., 1st sess.

[18] See Indian Reorganization Act of June 18, 1934, 48 Stat. 984, which provides (secs. 1, 18) that no lands of any Indian reservation shall be allotted in severalty where the Indians have not voted against application of the Act to their affairs. Hence, the proposed bill would only apply to those Mission Indian reservations where the Indians had voted against application of the Indian Reorganization Act. The Palm Springs Reservation was among those to which the bill would apply, the Indians thereon having voted against application of the Indian Reorganization Act.

Thus, it will be seen that an administrative problem exists on the Palm Springs Reservation which involves conflicting interests of some members of the Palm Springs Band of Indians and of the Band as a whole and which requires the working out of an equitable solution. As the legislation he has proposed to Congress indicates, the Secretary of the Interior believes that the problem should be resolved in the interest of the Band as a whole, and that ultimately a final solution may have to be arrived at through action of the Congress. On the facts involved, it would appear that the Secretary's judgment in favor of the Band as a whole is wholly reasonable. And it is in no way unfair to those Indians who have made selections for allotment. Any interest they have in the lands selected is not a vested interest and is both subsequent and subordinate to that of the Band. They will undoubtedly participate along with the others of the Band in the benefits resulting from the solution which will be made of the Palm Springs Indian problem, and it is not improbable that they will benefit more if no allotments are made than they would otherwise.

II

THE UNITED STATES IS NOT ESTOPPED TO DENY THAT PETITIONER IS ENTITLED TO ALLOTMENTS IN SEVERALTY

Petitioner asserts (R. 10–12) that the United States is estopped to deny that he is entitled to

allotments in severalty because (1) on or about October 26, 1923, "the Indian authorities at Washington, D. C." through Wadsworth advised him that he might enter upon and possess the lands selected "for the purpose of cultivation and planting of early crops," and Wadsworth encouraged him to do this; (2) Wadsworth advised him that his certificate of selection "would be evidence of complainant's vested right and authority to possess, hold, and improve the said lands * * *"; and (3) the Commissioner of Indian Affairs and the Secretary of the Interior stated and represented to him "that a patent in trust would issue * * * covering * * * said lands * * * by reason of said selection, scheduling and certificates for allotment * * *."

The complaint also alleges (R. 12–13) that by reason of those acts and representations petitioner "did improve said lands by erecting thereon buildings, and other permanent structures and improvements, assigned for and suitable for use for residential, commercial, and business purposes, productive of income and revenue, and equipped with modern conveniences for the use, maintenance and operation thereof and the continuous permanent improvement of said lands." The complaint further alleges (R. 9) that long prior to the issuance and delivery of the certificate of selection petitioner "had been in actual physical possession of a portion of the said lands so selected

by him for allotment, had actually resided thereon, and had erected valuable buildings and improvements thereon." It further alleges (R. 3) that petitioner is an Indian who has adopted "the habits, ways, and methods of living of the civilized life" and "is possessed of a degree of education and intelligence above the average of any race."

In view of the allegations of the complaint taken as a whole, it is manifest that the acts and representations upon which petitioner grounds his claim of estoppel were not such as to warrant his believing that he had a right to allotments in severalty or had a vested title to the lands he selected; that implicit in those acts and representations was the fact that petitioner would have no vested right or title to those lands until the Secretary approved the selections for allotment and issued trust patents; and that there was a consciousness of this on petitioner's part. It seems plain, also, that it fairly appears from these allegations that petitioner was aware that his only right, if any, to the lands involved was a possessory one and, especially in view of the allegation that he had occupied and substantially improved the lands long prior to the issuance of the certificates of selection, that the alleged acts and representations were not the motivating cause which induced him to erect on the selected lands "buildings, and other permanent structures and improvements * * * suitable for use for

residential, commercial, and business purposes." As has been shown, the Secretary's approval of the selections for allotment is a condition precedent to the acquisition by petitioner of any final right or title to the lands selected, and petitioner is presumed to have known this to be so. On the face of this complaint it is hardly possible to conclude that petitioner was unaware of or misled as to the fact that he had no vested right or title to the lands he selected, when he made the substantial and permanent improvements referred to.

In any event petitioner's plea of estoppel against the United States is not well made. As he well recognizes (Pet. 12), the United States is not bound or estopped by the unauthorized acts of its officers or agents. *Utah Power & Light Co.* v. *United States,* 243 U. S. 389, 409; *Yuma Water Assn.* v. *Schlecht,* 262 U. S. 138, 144; *United States* v. *San Francisco,* 310 U. S. 16, 31–32. It is plain that the United States may in no way be bound by any acts and representations by Wadsworth and the Commissioner of Indian Affairs, since they are subordinate officers to whom no final administrative authority was ever delegated by Congress. And as for the acts and representations attributed to the Secretary, to whom administrative authority was delegated by Congress, it is clear that the Mission Indian legislation does not sanction or permit of his concluding the rights of the United States and of the Palm Springs

Band of Indians by a representation such as he is here alleged to have made. As has been seen, the Mission Indian legislation authorized and required the Secretary of the Interior not to approve the selections for allotments when in his judgment it would be inequitable to, and inimical to the interests of, the Palm Springs Band of Indians as a whole to do so. It follows therefrom that a representation such as alleged would be outside of and inconsistent with his authority under that legislation. Hence, a plea of estoppel grounded on such an act or representation will not lie against the United States, for otherwise the policy and purpose of the Mission Indian legislation requiring the protection of the interests of the Palm Spring Band of Indians as a whole as regards the allotment problem on their reservation would be frustrated. *Ibid.* No weight may properly be attached to petitioner's assertion that the representation by the Secretary amounts to an administrative interpretation of the Mission Indian legislation or to the dignity of a rule or regulation thereunder, since it so plainly appears that the understanding of the Secretary of the Interior is definitely to the contrary. Cf. *United States* v. *San Francisco*, 310 U. S. 16, 31–32.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

NORMAN M. LITTELL,
Assistant Attorney General.
NORMAN MACDONALD,
Attorney.

I have authorized the filing of this brief.

CHARLES FAHY,
Solicitor General.

MARCH 1944.

APPENDIX

1. The Act of January 12, 1891, 26 Stat. 712, is as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That immediately after the passage of this act the Secretary of the Interior shall appoint three disinterested persons as commissioners to arrange a just and satisfactory settlement of the Mission Indians residing in the State of California, upon reservations which shall be secured to them as hereinafter provided.
>
> SEC. 2. That it shall be the duty of said commissioners to select a reservation for each band or village of the Mission Indians residing within said State, which reservation shall include, as far as practicable, the lands and villages which have been in the actual occupation and possession of said Indians, and which shall be sufficient in extent to meet their just requirements, which selection shall be valid when approved by the President and Secretary of the Interior. They shall also appraise the value of the improvements belonging to any person to whom valid existing rights have attached under the public-land laws of the United States, or to the assignee of such person, where such improvements are situated within the limits of any reservation selected and defined by said commissioners subject in each case to the approval of the Secretary of the Interior. In cases where

the Indians are in occupation of lands within the limits of confirmed private grants, the commissioners shall determine and define the boundaries of such lands, and shall ascertain whether there are vacant public lands in the vicinity to which they may be removed. And the said commission is hereby authorized to employ a competent surveyor ~~and the necessary~~ assistants.

SEC. 3. That the commissioners, upon the completion of their duties, shall report the result to the Secretary of the Interior, who, if no valid objection exists, shall cause a patent to issue for each of the reservations selected by the commission and approved by him in favor of each band or village of Indians occupying any such reservation, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus patented, subject to the provisions of section four of this act, for the period of twenty-five years, in trust, for the sole use and benefit of the band or village to which it is issued, and that at the expiration of said period the United States will convey the same or the remaining portion not previously patented in severalty by patent to said band or village, discharged of said trust, and free of all charge or incumbrance whatsoever: *Provided,* That no patent shall embrace any tract or tracts to which existing valid rights have attached in favor of any person under any of the United States laws providing for the disposition of the public domain, unless such person shall acquiesce in and accept the appraisal provided for in the preceding section in all respects and shall thereafter, upon demand and payment of said appraised value, execute a release of all title and claim

thereto; and a separate patent, in similar form, may be issued for any such tract or tracts, at any time thereafter. Any such person shall be permitted to exercise the same right to take land under the public-land laws of the United States as though he had not made settlement on the lands embraced in said reservation; and a separate patent, in similar form, may be issued for any tract or tracts at any time after the appraised value of the improvements thereon shall have been paid: *And provided further,* That in case any land shall be selected under this act to which any railroad company is or shall hereafter be entitled to receive a patent, such railroad company shall, upon releasing all claim and title thereto, and on the approval of the President and Secretary of the Interior, be allowed to select an equal quantity of other land of like value in lieu thereof, at such place as the Secretary of the Interior shall determine: *And provided further,* That said patents declaring such lands to be held in trust as aforesaid shall be retained and kept in the Interior Department, and certified copies of the same shall be forwarded to and kept at the agency by the agent having charge of the Indians for whom such lands are to be held in trust, and said copies shall be open to inspection at such agency.

SEC. 4. That whenever any of the Indians residing upon any reservation patented under the provisions of this act shall, in the opinion of the Secretary of the Interior, be so advanced in civilization as to be capable of owning and managing land in severalty, the Secretary of the Interior may cause allotments to be made to such Indians.

out of the land of such reservation, in quantity as follows: To each head of a family not more than six hundred and forty acres nor less than one hundred and sixty acres of pasture or grazing land, and in addition thereto not exceeding twenty acres, as he shall deem for the best interest of the allottee, of arable land in some suitable locality; to each single person over twenty-one years of age not less than eighty nor more than six hundred and forty acres of pasture or grazing land and not exceeding ten acres of such arable land.

SEC. 5. That upon the approval of the allotments provided for in the preceding section by the Secretary of the Interior he shall cause patents to issue therefor in the name of the allottees, which shall be of the legal effect and declare that the United States does and will hold the land thus allotted for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State of California, and that at the expiration of said period the United States will convey the same by patent to the said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: *Provided*, That these patents, when issued, shall override the patent authorized to be issued to the band or village as aforesaid, and shall separate the individ-

ual allotment from the lands held in common, which proviso shall be incorporated in each of the village patents.

SEC. 6. That in cases where the lands occupied by any band or village of Indians are wholly or in part within the limits of any confirmed private grant or grants, it shall be the duty of the Attorney-General of the United States, upon request of the Secretary of the Interior, through special counsel or otherwise, to defend such Indians in the rights secured to them in the original grants from the Mexican Government, and in an act for the government and protection of Indians, passed by the legislature of the State of California April twenty-second, eighteen hundred and fifty, or to bring any suit, in the name of the United States, in the Circuit Court of the United States for California, that may be found necessary to the full protection of the legal or equitable rights of any Indian or tribe of Indians in any of such lands.

SEC. 7. That each of the commissioners authorized to be appointed by the first section of this act shall be paid at the rate of eight dollars per day for the time he is actually and necessarily employed in the discharge of his duties, and necessary traveling expenses; and for the payment of the same, and of the expenses of surveying, the sum of ten thousand dollars, or so much thereof as may be necessary, is hereby appropriated out of any money in the Treasury not otherwise appropriated.

SEC. 8. That previous to the issuance of a patent for any reservation as provided in section three of this act the Secretary of the Interior may authorize any citizen of the United States, firm, or corporation to

construct a flume, ditch, canal, pipe, or other appliances for the conveyance of water over, across, or through such reservation for agricultural, manufacturing, or other purposes, upon condition that the Indians owning or occupying such reservation or reservations shall, at all times during such ownership or occupation, be supplied with sufficient quantity of water for irrigating and domestic purposes upon such terms as shall be prescribed in writing by the Secretary of the Interior, and upon such other terms as he may prescribe, and may grant a right-of-way for rail or other roads through such reservation: *Provided,* That any individual, firm, or corporation desiring such privilege shall first give bond to the United States, in such sum as may be required by the Secretary of the Interior, with good and sufficient sureties, for the performance of such conditions and stipulations as said Secretary may require as a condition precedent to the granting of such authority: *And provided further,* That this act shall not authorize the Secretary of the Interior to grant a right-of-way to any railroad company through any reservation for a longer distance than ten miles. And any patent issued for any reservation upon which such privilege has been granted, or for any allotment therein, shall be subject to such privilege, right-of-way, or easement. Subsequent to the issuance of any tribal patent, or of any individual trust patent as provided in section five of this act, any citizen of the United States, firm, or corporation may contract with the tribe, band, or individual for whose use and benefit any lands are held in trust by the United States, for the right to construct a flume, ditch,

canal, pipe, or other appliances for the conveyance of water over, across, or through such lands, which contract shall not be valid unless approved by the Secretary of the Interior under such conditions as he may see fit to impose.

2. The pertinent provision of the Act of March 2, 1917, 39 Stat. 969, 976, is as follows:

> That section three of the Act of January twelfth, eighteen hundred and ninety-one (Twenty-sixth Statutes at Large, page seven hundred and twelve), entitled "An Act for the relief of Mission Indians in the State of California," be, and the same is hereby, amended so as to authorize the President, in his discretion and whenever he shall deem it for the interests of the Indians affected thereby, to extend the trust period for such time as may be advisable on the land held in trust for the use and benefit of the Mission Bands or villages of Indians in California: *Provided*, That the Secretary of the Interior be, and he is hereby, authorized and directed to cause allotments to be made to the Indians belonging to and having tribal rights on the Mission Indian reservations in the State of California, in areas as provided in section seventeen of the Act of June twenty-fifth, nineteen hundred and ten (Thirty-sixth Statutes at Large, page eight hundred and fifty-nine), instead of as provided in section four of the Act of January twelfth, eighteen hundred and ninety-one (Twenty-sixth Statutes at Large, page seven hundred and thirteen): *Provided*, That this act shall not affect any allotments heretofore patented to these Indians.

3. The Act of August 15, 1894, 28 Stat. 286, 305, as amended, 25 U. S. C. sec. 345, is as follows:

> All persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment Act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper district court of the United States; and said district courts are given jurisdiction to try and determine any action, suit, or proceeding arising within their respective jurisdiction involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty (and in said suit the parties thereto shall be claimant as plaintiff and the United States as party defendant); and the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him, but this provision shall not apply to any lands held August 15, 1894, by either of the Five Civilized Tribes, nor to any of the lands within the Quapaw Indian Agency: *Provided*, That the right of appeal shall be allowed to either party as in other cases.

4. The pertinent provisions of the General Allotment Act, as amended, 25 U. S. C. secs. 331-333, follow:

§ 331. Allotments on reservations; irrigable and nonirrigable lands.

In all cases where any tribe or band of Indians has been or shall be located upon any reservation created for their use by treaty stipulation, Act of Congress, or Executive order, the President shall be authorized to cause the same or any part thereof to be surveyed or resurveyed whenever in his opinion such reservation or any part may be advantageously utilized for agricultural or grazing purposes by such Indians, and to cause allotment to each Indian located thereon to be made in such areas as in his opinion may be for their best interest not to exceed eighty acres of agricultural or one hundred and sixty acres of grazing land to any one Indian. And whenever it shall appear to the President that lands on any Indian reservation subject to allotment by authority of law have been or may be brought within any irrigation project, he may cause allotments of such irrigable lands to be made to the Indians entitled thereto in such areas as may be for their best interest, not to exceed, however, forty acres to any one Indian, and such irrigable land shall be held to be equal in quantity to twice the number of acres of nonirrigable agricultural land and four times the number of acres of nonirrigable grazing land: *Provided,* That the remaining area to which any Indian may be entitled under existing law after he shall have received his proportion of irrigable land on the basis of equalization herein established may be allotted to him from nonirrigable agricultural or grazing lands: *Provided further,* That where a treaty or Act of Congress setting apart such reservation provides for allot-

ments in severalty in quantity greater or less than that herein authorized, the President shall cause allotments on such reservations to be made in quantity as specified in such treaty or Act, subject, however, to the basis of equalization between irrigable and nonirrigable lands established herein, but in such cases allotments may be made in quantity as specified herein, with the consent of the Indians expressed in such manner as the President in his discretion may require.

§ 332. Selection of allotments.

All allotments set apart under the provisions of sections 331–333 of this title shall be selected by the Indians, heads of families selecting for their minor children, and the agents shall select for each orphan child, and in such manner as to embrace the improvements of the Indians making the selection. Where the improvements of two or more Indians have been made on the same legal subdivision of land, unless they shall otherwise agree, a provisional line may be run dividing said lands between them, and the amount to which each is entitled shall be equalized in the assignment of the remainder of the land to which they are entitled under said sections: *Provided,* That if any one entitled to an allotment shall fail to make a selection within four years after the President shall direct that allotments may be made on a particular reservation, the Secretary of the Interior may direct the agent of such tribe or band, if such there be, and if there be no agent, then a special agent appointed for that purpose, to make a selection for such Indian, which selection shall be allotted as in cases where selections are made

by the Indians, and patents shall issue in like manner.

§ 333. Making of allotments by agents.

The allotments provided for in sections 331–333 of this title, shall be made by special agents appointed by the President for such purpose, and the superintendents or agents in charge of the respective reservations on which the allotments are directed to be made, or, in the discretion of the Secretary of the Interior, such allotments may be made by the superintendent or agent in charge of such reservation, under such rules and regulations as the Secretary of the Interior may from time to time prescribe, and shall be certified by such special allotting agents, superintendents, or agents to the Commissioner of Indian Affairs, in duplicate, one copy to be retained in the Indian Office and the other to be transmitted to the Secretary of the Interior for his action, and to be deposited in the General Land Office.

5. Letter from the Secretary of the Interior to the Chairman of the Senate Committee on Indian Affairs, having relation to the Act of March 2, 1917:

JAN. 7, 1916.

Hon. HENRY F. ASHURST,
Chairman,
Committee on Indian Affairs,
United States Senate.

My dear Senator: I transmit herewith the draft of a bill to authorize allotments to members of the Mission Indian bands in California, under authority of section 17 of the act of June 25, 1910 (36 Stat. L., 855-859). In the Department's letter of March 21, 1912, to the former Chairman

of the Senate Indian Committee, the necessity was given in detail of allotting the Morongo Mission band under the provisions of the general allotment act of February 8, 1887 (24 Stat. L., 388), as amended by the act of June 25, 1910, supra, rather than under the act of January 12, 1891 (26 Stat. L., 712–713). The matter was again presented to the Congress by letter of December 13, 1913. This proposed legislation has been favorably reported upon by the House Committee on Indian Affairs (See Report No. 397 to accompany H. R. 10505, 63rd Congress, 2d Session).

There has been no material change in conditions on the reservation since the prior requests of the Department for authority to allot the Morongo band under the terms of the act of June 25, 1910. Reports have been received from various field officers of the Indian Service, who have investigated conditions on the reservation, which indicate that these Indians greatly desire the identification of their individual land interests, and that they have reached the status where they would be benefited by the allotment of their reservation in severalty.

The act of January 12, 1891, supra, authorizes allotments to heads of families and single persons over 21 years of age, and makes no provision for married women, or for single persons under 21 years of age, whereas under the provisions of section 17 of the act of June 25, 1910, a pro rata division may be made of the land suitable for allotment purposes. The act of February 8, 1887 (24 Stat. L., 388), made no provision for married women, and many cases have come to the notice of the Department of divorces or desertions which

left unprovided with land married women who were supposed to share equally with the head of the family when the allotments were made. This condition was cured in subsequent allotments by the amending act of February 28, 1891 (26 Stat. L., 794), which authorized allotments to each Indian, in equal area, without considering their age or marital status. This act was further amended by section 17 of the act of June 25, 1910, supra, which provides for allotments in areas of 40 acres of irrigable land, or 80 acres of nonirrigable agricultural land, or 160 acres of nonirrigable grazing land. There is on the Morongo Reservation sufficient land to allot each Indian entitled, about five acres of irrigable land with a reasonable amount of grazing land, and the Department is of the opinion that it would be the wiser and better plan to make a pro rata division of the land of these Indians rather than to attempt to allot under the act of January 12, 1891.

In many instances the more influential members of the band have cultivated larger tracts than they would be entitled to receive as allotments, and have prevented the more timid ones from establishing a permanent home on the reservation by their own individual labor. This is a condition that can not be cured entirely until the lands have been allotted in severalty. Again, many of the members who might cultivate and improve lands do not feel justified in expending their labor and their small earnings in plowing and planting and building unless they are fully assured that they will receive the improved tract as an allotment. The Department believes that the present conditions, while much better than they were some years ago, would be rapidly im-

proved by allotment in severalty, provided authority to pro rate the available land is given.

What has been said with regard to allotting the Morongo band under section 17 of the act of June 25, 1910, supra, applies with equal force to the other Mission bands that have been patented lands under the acts of January 12, 1891, and March 1, 1907, supra. The proposed bill has therefore been made applicable to all of these Indians rather than to the Morongo band specifically. A list showing the Mission bands, number of Indians, and area of patented lands is enclosed.

It may be well to mention the act of May 27, 1902 (32 Stat. L., 245–257), which authorized the purchase of lands for the Warners Ranch Indians, now known as the Pala band, and allotments to these Indians under the terms of the general allotment act of February 8, 1887 (24 Stat. L., 388). These lands were practically pro rated among the Indians entitled, by the allotment of small areas of good irrigable land with the addition of a small quantity of grazing land. Reports show a general improvement in the condition of this particular band of Mission Indians and a lively interest in cultivating and improving their patented land, as they are now assured of the particular tracts on which they may establish permanent homes.

The Department would be pleased to see the legislation, as now proposed, enacted into law.

Cordially yours,

(Sgd.) FRANKLIN K. LANE.

11–JM–29.
Encl. 14529.

A BILL Authorizing the Secretary of the Interior to cause allotments to be made on Mission Indian Reservations in California

BE IT ENACTED BY THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That the Secretary of the Interior, be, and he is hereby, authorized and directed to cause allotments to be made to the Indians belonging to and having tribal rights on the Mission Indian Reservations in the State of California, in areas as provided in section seventeen of the act of June twenty-fifth, nineteen hundred and ten (Thirty-sixth Statutes at Large, page eight hundred and fifty-nine), instead of as provided in section four of the act of January twelfth, eighteen hundred and ninety-one Twenty-sixth Statutes at Large, page seven hundred and thirteen): Provided, That this act shall not affect any allotments heretofore patented to these Indians.

6. Instructions from the Secretary of the Interior to Wadsworth as regards the making of allotments:

Land-Allot

94531-20
T D M

JAN. 26, 1922.

Mr. Harry E. Wadsworth,
Special Alloting Agent,
Therman, California.

Dear Mr. Wadsworth; Your attention is again invited to the correspondence relative to the allotting of a portion of the lands of the Torres-Martinez Indian Reservation.

This will advise you that the Tribal Roll, recently prepared and forwarded to the Office by you, has been accepted as correct

and will constitute the basis for assigning the allotments. It is noted that there were 213 persons eligible to receive allotments at the date on which that roll was completed. It is also observed from the Classification Schedule, submitted with your report of June 27, 1921 that there are within the Torres-Martinez Reservation approximately 11,000 acres of land, classified as irrigable, in addition to that not susceptible of irrigation.

It is evident, from the above data, that there is land available for allotting each enrolled Indian 40 acres of the land classified as irrigable, and it has been decided to take action along that line. You are directed, therefore, to begin the allotting of said Torres-Martinez lands as soon as your present assignment has been completed, which you have stated would be about February 1, 1922.

The land involved has already been surveyed into townships and sections and the survey accepted by the General Land Office. You are instructed to assign the allotments in tracts of approximately 40 acres each of irrigable lands only. It is very important that the allotment selections be described in legal sub-divisions and made to conform to the public survey. If, however, in some instances it seems necessary to approve selections that do not conform to the survey, such cases should first be referred to the Office, with rough plats and other data showing the conditions obtaining, and you will receive instructions as to the advisability of listing such selections on the schedules. It is assumed that you have satisfactory plats and maps of the territory to be allotted, in your possession, or available for consultation.

No allotment selection should be permitted on any land other than that classified as irrigable, since it is contemplated to encourage the placing of each allotment, or at least a portion thereof, under irrigation as soon as possible. The lands classified as not susceptible of irrigation will remain in the tribal status pending future disposition.

The allotments herein authorized will be made under the provisions of the Act of Congress of February 8, 1887 (24 Stat. L., 388), as amended by the Act of June 25, 1910 (36 Stat. L., 855), and supplemented by the Act of March 2, 1917 (39 Stat. L., 969–76). The allotment selections should be listed, as made and reported, and Certificates issued therefor on Form 5-201. Care should be exercised in that connection to issue the Certificates only in cases where you are satisfied that the person for whom the land is selected is living. The names of those Indians who shall have died since the roll was prepared should be disregarded, and on the other hand, the names of children born, to duly enrolled members, may be added to the roll and may be allotted up to such date as you may set for the completion of the allotment schedules.

Each Indian who has reached the age of discretion should be permitted to select his own allotment, but the selections for minors may be made by the parents, if living, or by some other person whom you regard as competent to do so. Selections for orphans should be made by you.

If any Indian has acquired an equitable right to a specific tract of land by reason of occupancy, improvement, and use, such right should be recognized and protected as fully as possible by permitting him, or

members of his family, to select such land. Each allotment selection should be marked in a definite manner with corner posts, and the same should be pointed out to the allottees whenever it is practicable.

The allotment schedules should be made in triplicate, on Form 5–176. On each schedule should be placed the allotment number, the name of the allottee, relationship, sex, age, and the description of the land as indicated by the column headings. You should allow not less than three lines between the allotment descriptions, to provide for available space that may be needed in the future to enter new descriptions if modifications should be necessary. On the last page of each copy of the schedules should be placed a certificate showing the date on which the listing of allotment selections began, also the date on which said work closed, together with a statement to the effect that the allotments shown thereon were made in accordance with the provisions of the Acts of Congress herein before cited, and said certificate should be dated and duly signed by you. When completed the original and duplicate copies of the schedules should be transmitted to the Office and the triplicate copy placed in the Agency files.

All allotment selections should be reproduced graphically on tracing cloth township plats (Form 5–177a), and the name of each allottee, and the allotment number, should be shown on the diagram. Only one copy of said plats should be prepared, which copy should be forwarded to the Office with the schedules.

Monthly reports in duplicate showing the status of the work should be submitted to the Office on Form 5–250, within ten

days after the expiration of the month. All doubtful questions which may arise should be referred to the Office and specific instructions will be given for your guidance. The necessary forms for use in the work are being sent to you under separate cover, and your request for any additional supplies found necessary may be made on Form 5–262.

Sincerely yours,

/S/ Chas. H. Burke, Commissioner.

Approved: Jan. 26, 1922.

(Sgd.) F. M. Goodwin,
Assistant Secretary.

Copy to: Northern Mission Agency.
1–26–20.

7. Superintendent Ellis' letter to Commissioner of Indian Affairs, in regard to opposition among the Palm Springs Band of Indians to allotments:

85 684–23

DEPARTMENT OF THE INTERIOR

UNITED STATES INDIAN FIELD SERVICE,
MISSION INDIAN AGENCY,
Riverside, Calif., Nov. 26, 1923.

Hon. Chas. H. Burke,
Commissioner of Indian Affairs,
Washington, D. C.

My dear Mr. Commissioner: Replying to your letters of the 6th instant and subsequent dates regarding petitions against allotments received from 28 bands of Mission Indians, I have made particular inquiry and do not believe there is any connection between the petition secured by Messrs. Collier and Berle at Palm Springs, and the petitions from the other reservations. All the five petitions sent me and I suppose the others (except the Palm

Springs petition) were worded alike and were prepared during the recent semi-annual meeting of the Mission Indian Federation held at Joanthan Tibbets place in Riverside, and distributed through attending representatives from all the Mission reservations. These meetings have been held at regular intervals for last four years and they have opposed allotting from the beginning and persistently have adopted resolutions and sent protests to officials in Washington, Members of Congress and other prominent persons asking that the allotting be prevented. Attached to my letter of November 1st is newspaper clipping of resolutions adopted at last meeting of the federation in which allotting is again opposed.

Shortly after my meeting with Dr. Comstock and the Agua Caliente Indians at Palm Springs, Mr. Collier and a "big heavy man" (Mr. Berle) met the Indians at the Palm Springs bath house. Mr. Collier did most of the talking to the Indians and is reported to have told the Indians that he would try to stop the allotting if they would give their reasons for opposing same and sign a petition he presented. The Indians told him that no one had explained the allotting to them and complained that land and improvements were taken from some Indians to give to others. Mr. Collier is said to have told the Indians that if they were allotted, they would be made citizens, receive patents in fee and thus lose their land. This last assertion is borne out by inclosed newspaper clipping of an article released November 9th by Mr. Collier's American Indian Defense Association of New York City. The Indians were deceiving Messrs. Collier and Berle when they

were told that the allotting had not been explained to the Indians. See my letters to your Office dated May 16 and 25th and Office letters Land-Allot. 35474–5, dated May 4th.

Most of the Palm Springs (Agua Caliente) Indians have opposed allotting from the beginning. They protested through the Mission Indian Federation in May and to members of Congress, the Secretary of the Interior, Senator Borah, Mr. Wm. J. Bryan, Jr. and others of his Los Angeles Indian Welfare League, and three of the Indians appeared at the meeting of the League of the Southwest held last July at Santa Barbara to voice their protests. I don't think any one induced them to protest and believe they would oppose allotting even if Miss Green and Mr. Collier and others of his association had not taken a hand. Two members of Mr. Collier's Defense League at Santa Barbara, a Mr. Hoffman and a Mr. Franklin Price Knott, were at Palm Springs when Dr. Comstock and I held our meeting with the Indians. Mr. Knott remarked that he took up a collection of $200.00 at Santa Barbara to defray cost of the map sent to Mr. Collier. The Santa Barbara men seemed to be strangers to Dr. Comstock.

Dr. Comstock's attitude is favorable to allotments, and he so expressed himself to Mr. H. E. Wadsworth, the Allotting Agent, upon a recent visit to him in Los Angeles.

The five petitions sent me are being returned with separate reports.

Attached is copy of a letter dated Sept. 11th from Rev. Wm. H. Weinland to Miss Elizabeth Green in answer to her pamphlet published by Miss Hathaway about allotting and proposed national monument at

Palm Springs. Mr. Weinland's 32 years' residence among the Mission Indians gives his statements authority and he emphasizes the fact that individual allotments encourages improvements and progress as opposed to the reactionary communistic form of tribal holding of property which the old leaders of the bands wish to preserve and thus keep themselves in authority.

Sincerely yours,

(signed) C. L. Ellis, Superintendent.

2 incls.

8. Commissioner Burke's letter to the Secretary of the Interior, in regard to opposition among the Palm Springs Band to allotment:

UNITED STATES
DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
Washington, Dec. 22, 1926.

The Honorable The Secretary of the Interior.

SIR: The question of allotments of land to the Indians of the Mission reservations in southern California has received careful consideration, and there are submitted herewith my conclusions and recommendations as to the policy I believe should be pursued relative to this matter.

For some time past there has been brought to our attention newspaper articles and other forms of criticism of our treatment of these Indians, and some of these while undoubtedly based upon lack of information or upon misinformation, are especially bitter with respect to the alleged plan of alloting the Indians small tracts of doubtful quality. Certain Indians have also protested against allotments of any size

or character, and some of their white friends have magnified this opposition.

At the present time there are five schedules of allotments pending in this Office embracing lands on the Palm Springs, Augustine, Cabazon, LaJolla and Rincon Reservations, and reports are on file made by Inspector Blair, Superintendent Ellis, and Allotting Agent Wadsworth, containing reasons for approval, in whole or in part, of these schedules. Very recently Assistant Commissioner Meritt telegraphed from Riverside, California, with respect to Mission allotments that "allotments should be made to Mission Indians who desire them but not to objectors." Mr. Meritt assures me that in his opinion this plan if carried out will meet the approval of a majority of persons in California who are interested in this subject, including many of the Indians concerned.

There is ample authority of law for making allotments to the Mission Indians, and some of the reservations have already been allotted, including the Morongo, Pala, Sycuan, Temecula, and Torres-Martinez. From the best information available the Indians of these reservations are progressing and appear to be well satisfied with conditions.

It is my opinion that if we should proceed to allot the Indians on the other Mission reservations *who desire allotments*, and for which each allottee would receive a trust patent, it would be for their best interests, and improved conditions would follow naturally. Moreover I believe that if this were done, other Indians who are now classed as objectors, and those who oppose allotments of any character, would soon fall

in line and request that they too be given their proportionate share of the allottable areas.

Twenty-five year trust patents were issued to the various Mission bands pursuant to the Act of January 12, 1891 (26 Stat. 712), which Act also authorized allotments to individual Indians, the patents in such cases to supercede the outstanding patents issued in the names of various bands. The Act of March 2, 1917 (39 Stat. 969–976), amended the Act of January 12, 1891, supra, with respect to the method of allotment as to areas, and authorized the President in his discretion to extend the trust period for such time as might be advisable. These Indians are not capable of managing their own affairs without Government supervision, as a tribe or band or as individuals, except perhaps in isolated cases, and it is my belief that the President should be asked to extend the period of trust whenever occasion requires.

It is, therefore, recommended that this Office be authorized to revise the schedules now pending so as to eliminate the names and selections of those Indians who do not desire allotments at this time, and as revised to present the schedules for Departmental consideration with a view to approval and the issuance of trust patents as authorized by law. To accomplish this it is proposed to obtain the written consent of each Indian who desires to receive an allotment on the particular reservation of which he is a member. It is also recommended that we be authorized to instruct the allotting agent to proceed with the allotment work on the unallotted Mission

reservations so as to give each Indian a tract of not less than five acres of irrigable land if available, or such other suitable tract as the Indians may wish to select and improve as his permanent home. It is also recommended that we be authorized to present for Departmental approval a supplemental schedule now pending containing 27 selections on the Torres-Martinez Reservation. These selections were formerly listed on the regular allotment schedule for the Torres-Martinez Reservation, which was approved October 27, 1922. These selections, however, were excepted from approval at that time for the reason that it was deemed advisable to have certain wells, which are located thereon, segregated and eliminated from the allotments. The wells were constructed by the Government and are now operated for the benefit of the Indians of that reservation generally.

If these recommendations are approved the Superintendent and the Allotting Agent will be promptly advised and instructed, and such other action will be taken as may be necessary to carry out the plan herein proposed.

Respectfully,

(s) Chas. H. Burke,
Commissioner.

Approved: JAN. 5, 1927.

(s) Hubert Work,
Secretary.

9. Assistant Commissioner Meritt's letter to Wadsworth, in regard to opposition among the Palm Springs Band of Indians to allotment:

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Land-Allot
252–23
H V C

JAN. 8, 1927.

Mr. H. E. Wadsworth,
Special Allotting Agent.

My dear Mr. Wadsworth: There is inclosed copy of Office letter dated December 22, 1926, approved by the Department January 5, 1927, outlining the policy to be pursued with reference to the allotments on the Mission reservations in southern California, and particularly with respect to certain schedules now pending in this Office.

You will observe that it is proposed to obtain the written consent of every Indian who desires to receive an allotment on the particular reservation of which he is a member. This plan necessarily involves a revising of the pending schedules, or the making of entirely new schedules. As it may be necessary to make numerous changes and probably in some cases add new selections for Indians not now enumerated, and in view of the fact that the certificate of yourself and the Superintendent on the pending schedules will also need modification or change, it is believed advisable to adopt the plan of making entirely new schedules.

All of the pending schedules and the tracings of township plats submitted in each case are being sent to you under separate cover in care of the Mission Agency at Riverside. As soon as convenient after receipt of these instructions and allowing sufficient time for the arrival of the schedules at Riverside, you will proceed there for examination of the papers and

for conference with the officer in charge. Thereafter you will please obtain if possible, from each Indian whose name is enumerated on the pending schedules, his written consent to receive an allotment on the particular reservation of which he is a member, or have such written consent signed by some one entitled to represent the allottee. Commencing with the Rincon Reservation you will prepare a new schedule for each reservation, on which you will place the selections of all Indians entitled to allotments and who have given their written consent. It is not important whether the written consent in such cases be prepared separately or in the form of a petition properly worded to answer the purpose. In either case it should be prepared in duplicate, and the original forwarded to this Office with the schedule.

As the allotment work on the mission reservations has been suspended for a considerable period, now that a definite plan of procedure has been decided upon it is desirable to adjust the pending schedules at the earliest date possible, so that the Indians who are ready for allotments may receive trust patents for the lands selected by them. You are therefore requested to give this matter your immediate and continuous attention, and forward to this Office as soon as may be new schedules in duplicate in lieu of those to be returned to you, which are enumerated as follows with the number of selections in each case:

> Augustine, 16; Palm Springs, 50; Cabazon, 29; Rincon, 123; LaJolla, 114; Mission Creek, 21.

A copy of this letter and a copy of the inclosure will be sent to the Mission Agency,

and the officer in charge is hereby requested to give you all possible assistance to expedite your work under these instructions, and as each new schedule is completed he is authorized to join with you in the usual certificate.

Sincerely yours,

(signed) B. B. Meritt,
Assistant Commissioner.

(Copy to Mission.)

10. Superintendent Ellis' letter to the Commissioner of Indian Affairs in regard to the increase in value of the lands selected for allotment:

District Superintendency No. 6

UNITED STATES
DEPARTMENT OF THE INTERIOR,
INDIAN FIELD SERVICE,
Muskogee, Oklahoma, August 2, 1928.

The Honorable,
Commissioner of Indian Affairs.

My dear Mr. Commissioner: I am in receipt of your letter of July 24th, and under separate cover a duplicate schedule of allotment selections for Indians of Palm Springs (Ague Caliente) Indian Reservation, California, submitted under date of May 9, 1927 by Mr. H. E. Wadsworth, Special Allotting Agent.

Reference is made in your letter to enclosed copy of a recent communication from Mr. Wadsworth dated June 10, 1928, to which is attached copy of Office letter to him dated April 24, 1928, and copy of a proposed letter to the Department recommending approval of this schedule with certain exceptions. I am directed to consider the essential details and append such endorsement on both copies of the schedule

as may be consistent with my views regarding the selections or parts of selections which I think should be suspended.

I am returning the schedules herewith in order that I may join Mr. Wadsworth in the same certificate by having the schedule copied, omitting selections Nos. 16, 18, 19, 20 and 21, allotted respectively to Richard Amado Miguel, Genevieve Pierce St. Marie, Ruth Florilla St. Marie, Carrie Pierce Casero and Anna J. Pierce.

The above correspondence is in error in stating that selection No. 22 was recommended for suspension; it should have been No. 21. These five selections each contain, as has been set out in previous reports, 40 acres of desert land which is exceedingly valuable for townsite purposes, being adjacent to the rapidly growing winter resort of Palm Springs which is becoming the most popular winter resort of California and attracting many people of great wealth who are building expensive winter homes there. Besides residences, there are several large hotels, two of which have invested a $1,000,000 or more each.

I trust your Office will acquiesce in my views that these five allotments should be eliminated from this schedule as suggested above. This will require no work except that taken in doing the typewriting. At a later date the above allottees, when they decide to take other selections, can have their selections resubmitted in another schedule.

Respectfully,

(Sgd.) C. L. Ellis,
District Superintendent.

U. S. GOVERNMENT PRINTING OFFICE 1944

SUPREME COURT OF THE UNITED STATES.

No. 463.—October Term, 1943.

Lee Arenas, Petitioner,
vs.
The United States of America.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[May 22, 1944.]

Mr. Justice Jackson delivered the opinion of the Court.

The petitioner Arenas is a full-blood Mission Indian, regularly enrolled in the Agua Caliente or Palm Springs Band. He sued in the United States District Court to be awarded a trust patent to certain lands on the Palm Springs reservation. The Government was granted a summary judgment of dismissal on affidavits and on the record of the *St. Marie* litigation on like claims by similarly situated Indians.[1] No findings have been made in this case by the District Court. The Circuit Court of Appeals affirmed,[2] chiefly in reliance upon its previous decision in the *St. Marie* case, and we granted certiorari.[3]

For a long period Congress pursued the policy of imposing, as rapidly as possible, our system of individual land tenure on the Indian. To this end tribal or communal land holdings of the Indians were superseded by allotment to individuals, who were protected against improvidence by restraints on alienation.[4] The Mission Indians had deserved well and had fared badly[5] and Congress passed the Mission Indian Act of 1891[6] for their particular redress.

The first three sections of this Act set up a commission to settle these several bands on suitable reservations and directed that any

[1] St. Marie v. United States, 24 F. Supp. 237, 108 F. 2d 876, cert. denied because petition out of time, 311 U. S. 652.

[2] 137 F. 2d 199.

[3] — U. S. —.

[4] General Allotment Act of 1887, 24 Stat. 388, 25 U. S. C. § 331; see Cohen, Handbook of Federal Indian Law, c. 11.

[5] See report on conditions and needs of the Mission Indians, Sen. Rep. No. 74, 50th Cong., 1st Sess.

[6] 26 Stat. 712.

propriate patents issue. The United States was to hold the titles in trust, however, for twenty-five years and then was to convey to the tribes any portions not previously patented in severalty to members. Several reservations were set apart, including one at Palm Springs, with which this and the *St. Marie* case were concerned.

The Act also provided in § 4 that whenever in the opinion of the Secretary of the Interior any of the Indians should "be so advanced in civilization as to be capable of owning and managing land in severalty, the Secretary of the Interior may cause allotments to be made to such Indians, out of the land of such reservation" and if specified the acreage to be allotted to each. Section 5 provided that on approval of the allotments the Secretary should cause patents to issue in the name of the allottees. For twenty-five years the lands were to remain in trust for their benefit and then were to be conveyed in fee free of the trust.[7]

Nevertheless, little was done toward allotment in severalty to Mission Indians for nearly twenty-five years. One reason, we gather, was that the Act authorized allotment on a more liberal basis than available lands would permit, although there may have

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[7] §§ 4 and 5 of the Act provide as follows:

"Sec. 4. That whenever any of the Indians residing upon any reservation patented under the provisions of this act shall, in the opinion of the Secretary of the Interior, be so advanced in civilization as to be capable of owning and managing land in severalty, the Secretary of the Interior may cause allotments to be made to such Indians, out of the land of such reservation, in quantity as follows: To each head of a family not more than six hundred and forty acres nor less than one hundred and sixty acres of pasture or grazing land, and in addition thereto not exceeding twenty acres, as he shall deem for the best interest of the allottee, of arable land in some suitable locality; to each single person over twenty-one years of age not less than eighty nor more than six hundred and forty acres of pasture or grazing land and not exceeding ten acres of such arable land.

"Sec. 5. That upon the approval of the allotments provided for in the preceding section by the Secretary of the Interior he shall cause patents to issue therefore in the name of the allottees, which shall be of the legal effect and declare that the United States does and will hold the land thus allotted for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State of California, and that at the expiration of said period the United States will convey the same by patent to the said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: *Provided*, That these patents, when issued, shall override the patent authorized to be issued to the band or village as aforesaid, and shall separate the individual allotment from the lands held in common, which proviso shall be incorporated in each of the village patents."

been other reasons. In 1916, however, Secretary Lane called the neglect to the attention of Congress and asked that he be authorized to make allotments in quantities governed by the General Allotment Act of 1887 as amended by section 17 of the Act of June 25, 1910, 36 Stat. 859, instead of in those set out in the Mission Indian Act of 1891. Thereupon Congress passed the Act of March 2, 1917[8] by which it "authorized and directed" the Secretary to proceed under the Act of 1910.

The Secretary on June 7, 1921 appointed Harry E. Wadsworth as Special Allotting Agent at Large for the Mission Indian Reservations of California and instructed him to prepare schedules of selections for allotments thereon. In 1923, Wadsworth filed a schedule showing selections on the Palm Springs Reservation for fifty members of the Band. The Secretary expressly disapproved this schedule. Complaint had come from the Indians, many of whom did not want allotments and had not made the selections listed in their names. When they failed to choose, the allotment agent had made a choice for them. The Secretary instructed Wadsworth to prepare a new schedule listing only selections voluntarily made and to leave off those who did not desire allotments. In 1927, the Department received from Wadsworth a new schedule showing voluntary selections for twenty-four members of the Palm Springs Band.

Each Indian for whom a selection was listed received from Wadsworth a certificate of selection for allotment. Each was stamped "Not valid unless approved by the Secretary of the Interior."

On October 26, 1923, Wadsworth asked the Indian Department for instructions, reciting, "Allotments being completed and certificates issued. Many allottees anxious to immediately occupy their selections and prepare things for early crops instead waiting for receipt of patents." On the same day he received reply, "No objection to Indians preparing their respective allotment selections for crops if properly listed on schedule." Wadsworth also wrote to one, at least, of the allottees in the *St. Marie* case, saying among other things, "It is difficult to tell exactly when you may expect these patents from Washington but I believe they should be here within 6 weeks or so. They will come to the

[8] 39 Stat. 969, 976.

superintendent in Riverside, who will notify you that they are there and ready for delivery to you. In the meantime, the Commissioner of Indian Affairs in Washington authorizes me to say to you that from this date you are entitled to enter upon and take possession of these allotments, and these certificates will be your evidence of such authority until the trust patents are received by you."

Wadsworth filed the schedule with the Department of the Interior. He attached a certificate, among other things reciting "that the allotments shown hereon were made in accordance with the provisions of the act of Congress of February 8, 1887 as amended by the Act of June 25, 1910 and supplemented by the Act of March 2, 1917." The General Land Office recommended that the schedule be approved, with exceptions that appear to have no bearing on the case before us.

But the allotments appear never to have been approved by the Secretary. He refuses to issue patents to which these Indians claim to be entitled. The Government's moving papers contain an affidavit by counsel declaring that the Secretary disapproved the allotments. But it gives no reason, and no order or statement of disapproval by the Secretary is in the record. The Government filed no pleading averring reasons for disapproval or, if disapproval was formal, setting forth the document. On the contrary, counsel seems to have taken the position that as matter of law the Secretary's reasons and the form of his disapproval were not relevant to any question the Court is empowered to decide.

The power of the Secretary so to refuse patents and the powerlessness of the courts to review the refusal are here maintained on these contentions: "It rests in the complete discretion of the Secretary of the Interior whether or not allotments shall be made on the Palm Spring Reservation. Sections 4 and 5 of the Act of January 12, 1891 contemplate three steps in the making of allotments on that reservation: (1) an opinion by the Secretary as to the capacity of the Indians to receive allotments; (2) a method or procedure for making such allotments; and (3) approval of the allotments by the Secretary. Each of these steps is under the control and rests in the discretion of the Secretary." Upon these grounds the trial court and the Circuit Court of Appeals held that the plaintiffs in the *St. Marie* cases were not entitled to patents and that this petitioner is not entitled to go to trial.

I.

The Secretary's discretion in determining the capacity of the Indians to receive allotments.

The Act of 1891 provides that "whenever any of the Indians residing upon any reservation patented under the provisions of this Act shall, *in the opinion of the Secretary of the Interior*, be so advanced in civilization as to be capable of owning and managing land in severalty, the Secretary of the Interior may cause allotments to be made to such Indians." (Emphasis supplied.) This undoubtedly conferred a very considerable discretion upon the Secretary.

The Act of 1917, however, drops the language of discretion and *directs* the Secretary to cause allotments to be made to the Indians on the Mission reservations.[9] The Act was prepared by the Secretary[10] and if it was intended to perpetuate his discretion as to whether the allotment policy was to be applied to these Indians at all, it might easily have so provided. Both the Secretary and Congress appear to have settled that point. The communication of the Secretary to the Chairman of the Senate Committee on Indian Affairs indicates no reservations about the Secretary's view that the Indians were qualified and that the Department should carry out the allotment policy. It points out certain evils and inequalities among the Indians under the tribal system of land holdings and says, "This is a condition that cannot be cured entirely until the lands have been allotted in severalty." And again it says, "The Department believes that the present conditions, while much better than they were some years ago, would be rapidly improved by allotment in severalty, provided authority to pro rate the available land is given."

Following passage of the Act the Secretary set about executing its directions. Wadsworth was appointed General Allotment Agent

[9] The Act of 1917 in relevant part provides that: " . . . the Secretary of the Interior be, and he is hereby, authorized and directed to cause allotments to be made to the Indians belonging to and having tribal rights on the Mission Indian reservations in the State of California, in areas as provided in section seventeen of the Act of June twenty-fifth, nineteen hundred and ten (Thirty-sixth Statutes at Large, page eight hundred and fifty-nine), instead of as provided in section four of the Act of January twelfth, eighteen hundred and ninety-one (Twenty-sixth Statutes at Large, page seven hundred and thirteen); *Provided*, That this act shall not affect any allotments heretofore patented to these Indians." 39 Stat. 969, 976.

[10] See letter of Secretary of Interior to Chairman of Senate Committee on Indian Affairs, January 7, 1916.

and was sent to the Indians with instructions to permit them to select their own allotments. When he selected for those who did not choose for themselves, his schedule was disapproved, and only for that reason. He was returned to the task of compiling voluntary selections for those who desired allotments, it being thought that if that were done those who objected "would soon fall in line and request that they too be given their proportionate share of the allottable areas."[11] There is no denial that Wadsworth was authorized to hold out to the Indians that their patents would be received in a few weeks and that meanwhile, if not already living, on their selected lands, they might enter into possession.

To assume that the Act of 1917, while directing the Secretary to make allotments, only meant to give him uncontrolled discretion not to do so would be a doubtful construction, in view of its history. But even if it were so interpreted, it did not require the Secretary to manifest his exercise of discretion in any formal way. His opinion that the Indians had the capacity for individual responsibility for land ownership could be indicated by conduct as well as by words. We think his conduct and words amount both to an administrative construction of the 1917 Act as a direction and to the exercise of any discretion he may have had under it.

If the Indians were not ready for allotments, why send an agent to hold out to them that hope and promise? Why the elaborate procedure of allotment? The Department then sought not only to offer allotment but to proceed so as to make the Indians "fall in line." Despite the obvious inference from these acts the record does not counter them by any showing that the Secretary now considers these Indians to lack civilization and capacity, tested by the usual standards for allotment, nor does it show that they do not in fact possess it. History and common knowledge of these Indians would indicate that they are not wanting in whatever it is that makes up "civilization." Long ago the Franciscans converted them to Christianity, taught them to subsist by good husbandry and handicrafts. Under the Treaty of Guadalupe Hidalgo (1848) their ancestral lands and their governance passed from Mexico to the United States. During the gold discovery days they were too gentle to combat the ruthless pressures of the whites

[11] Letter of the Commissioner of Indian Affairs to the Secretary of the Interior, December 22, 1926.

and came to lead a precarious and pitiable, but peaceful, existence. Eventually the country was aroused by their plight and set up a commission to investigate their grievances and to make recommendations for their protection and relief. It reported in 1884[12] and its recommendations were substantially embodied in the Mission Indian Act of 1891. By the standards of peacefulness, industry, and gentleness these Indians have long been "civilized." Even tested by the standard of acquisitiveness, they seem not to have failed. Improvements made by Arenas on the lands he occupied in reliance upon his certificate are valued at $15,000.

On the record as it now stands we do not think the Government has established the falsity of the allegations of the complaint that the Secretary had made the preliminary decision as to the allotments. We think the issue has been settled, in the absence of further proof to the contrary, by the Act of 1917 and the Secretary's action under it.

II.

The Secretary's discretion as to procedure for making such allotments.

We do not see that this is much in question nor is much in point, if true. Arenas does not question that the Secretary had discretion to adopt the method of allotment which was followed. He claims that both he and the Department have complied with it, that his choice has been ascertained, the lands have been identified and marked and reported to the Department, and that nothing remains for either to do to perfect the right to a patent. If there has been any irregularity in the procedure to lead to a patent, the Government has not pleaded or evidenced it in the case. We assume the Secretary's complete control of the method and, as the record stands, that his method has been executed to the point where a patent would issue but for the refusal of the Secretary.

III.

The Secretary's discretion as to final approval of the allotments.

This is the crux of the lawsuit. It is as to this final step that Congress has invested the courts with some responsibility.

The Act of August 15, 1894, 25 U. S. C. §345, authorizes Indians to commence and prosecute actions "in relation to their right"

[12] S. Ex. Doc. No. 49, 48th Cong., 1st Sess., reproduced in Sen. Rep. No. 74, 50th Cong., 1st Sess.

to land under any allotment act or under any grant made by Congress "in the proper district court of the United States; and said district courts are given jurisdiction to try and determine any action, suit or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty." It is further provided that "the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of Interior, as if such allotment had been allowed and approved by him."[13]

Under this statute the courts have decided disputes between Indians and the Government as to the relative qualifications of two claimants to receive, as a member of a band, a patent, *Hy-Yu-Tse-Mil-Kin* v. *Smith*, 194 U. S. 401, and whether particular lands were appropriate for allotment, *United States* v. *Payne*, 264 U. S. 446.

But here we do not know from any information developed in the adversary proceedings what the dispute between the Secretary of the Interior and Arenas is about. The Government did not answer the complaint. It foreclosed evidence on the facts by its motion for summary judgment, in which it incorporated the evidence in another proceeding. In that other proceeding no representative of the Government except the local Mission Indian agent and Wadsworth, the former allotment agent, were sworn. There appears to have been no testimony as to what happened to

[13] The statute in full is as follows:

"All persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment Act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper district court of the United States; and said district courts are given jurisdiction to try and determine any action, suit, or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty (and in said suit the parties thereto shall be claimant as plaintiff and the United States as party defendant); and the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him, but this provision shall not apply to any lands held August 15, 1894, by either of the Five Civilized Tribes, nor to any of the lands within the Quapaw Indian Agency: *Provided*, That the right of appeal shall be allowed to either party as in other cases."

the schedule of allotments after it reached Washington or as to whether it ever was approved or disapproved and, if so, how or by whom or why. The Government's affidavit filed in opposition to the motion recited that the Secretary's records "reveal that the Secretary of the Interior has disapproved the allotment schedule and certificates of selection." No entry order or memorandum of disapproval is produced, nor is the date thereof stated.

Certain facts do appear from which we know that this is no ordinary allotment problem. Each selection here included three kinds of land: a two-acre town lot, of considerable value; five acres of irrigable land of fair value; and forty acres of desert land. All of the town lots chosen are in Section 14, Township 4, South, Range 4, East. This section contains Palm Springs, a hot mineral spring, from which the reservation derives its name.

But the reservation itself is a checkerboard affair. At the time of its establishment the odd numbered sections already had been granted to the Southern Pacific Railroad and hence the reservation consisted of only even numbered sections. On the railroad sections the whites have established the settlement known as Palm Springs, a flourishing winter resort with large hotels and the usual business places and residences that characterize such a development. Out of this situation has grown conflict of interest between the Indians and the whites and between Indians themselves. The Indians, to the annoyance of the whites, seek to exploit their ownership of the springs, and the whites are accused, not without probable cause, of coveting the Indians' property rights therein. Those among both races who favor allotment allege that the denial of patents is designed to serve the white interests in Palm Springs by leasing or selling valuable tribal lands to those who are promoting the resort interests. Those who oppose issuance of patents allege that the allotment system is unfair to the tribe and will result eventually in the whites' getting possession and title to the lands. The outlines of the controversy are clear, but the summary disposition of the case has precluded the adversary trial which alone would give reliable foundation for determining it, if indeed the evidence will show that it should be the subject of judicial determination. The legal claims of this particular Indian to a patent for the lands he selected for allotment, which have long been in his possession and have been considerably improved with the knowledge of the Government, are now entangled in larger questions of Indian land policy.

The jurisdictional Act of 1894, under which this suit is in the courts, requires them to adjudicate legal rights of the parties and to render a judgment which will stand in lieu of the Secretary's action if he has *unlawfully denied* a patent to an allotment to which the Indian is entitled. But courts are not to determine questions of Indian land policy, nor can the Secretary on grounds of policy deprive an allottee of any rights he may have acquired in his allotment. To separate questions of right from questions of policy requires judicial examination of any well pleaded allegation of the complaint and of any grounds advanced for refusal of the patent. Even in some discretionary matters, it has been held that if an official acts solely on grounds which misapprehend the legal rights of the parties, an otherwise unreviewable discretion may become subject to correction. *Perkins* v. *Elg*, 307 U. S. 325, 349.

Since the government has not pleaded to the complaint nor offered evidence as to the Secretary's position we know it only as stated in argument. It appears that the sole reason for denying a patent is a departmental change of policy, by which the Secretary now disagrees with the allotment policy prescribed for these Indians by the Acts of 1891 and 1917. The Government brief says, "Meanwhile opposition to the making of allotments in severalty developed among the members of the Palm Springs band of Indians, and as a result administrative action on the 1927 schedule was further delayed. During this period the conclusion was reached in the Department that in fairness to the band as a whole and from the standpoint of their best interests the lands scheduled for allotment should be held in a tribal status and dealt with as a tribal asset." It says further, "The Secretary has determined that it would be inequitable and detrimental to the Palm Springs band of Indians as a whole to approve any allotments on their reservation." Again, "The Secretary should not be compelled to carry through a plan of allotment in severalty which in his judgment will operate contrary to the best interests of the Palm Springs band of Indians, but he should be permitted to stay his hand and seek a time which would be more in the interests of that band."

The Secretary has endeavored to persuade Congress that treatment other than the allotment policy embodied in its legislation would be more advantageous for the Indians. In 1935, he recommended to Congress a bill authorizing him to make a 99-year lease

of the reservation lands.[14] This failed of enactment. In 1937, the Secretary recommended a bill to repeal the provisions of the Act of March 2, 1917, directing the making of allotments on the Mission Indian reservations.[15] That bill failed. He also recommended a bill to authorize the sale of a part of the Palm Springs Reservation.[16] That likewise failed of enactment.

We think the grounds advanced by the Government by way of argument, although not by way of evidence, are inadequate to establish as matter of law that the petitioner has no legal right to a patent. Congress not only has failed to deny these allotment rights by legislation, but has rejected urgent and reiterated appeals from the Department to do so. Arenas is entitled to invoke the applicable legislation as it stands in determining whether he is entitled to have completed the all but fully executed policy of allotment.[17]

The petitioner made no counter motion in the District Court for summary judgment against the Government. Before us he asks only that his complaint be answered and that he be given a chance to establish his legal claim if he can by trial. The summary judgment against him should be reversed and the Government required to answer. We do not preclude motion by the Government to strike parts of the complaint if any are found to be improper pleading. But we think the duty of the Court under the jurisdictional act can be discharged in a case of this complexity only by trial, findings and judgment in regular course.

Reversed.

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[14] See H. R. Rep. No. 1521 and Sen. Rep. No. 1291, 74th Cong., 1st Sess.

[15] Sen. Rep. No. 1238, 75th Cong., 1st Sess. The Palm Springs Indians were among those which had voted against application to them of the Indian Reorganization Act of 1934, 48 Stat. 984, which would have terminated all future allotment in severalty.

[16] Hearings, House Committee on Indian Affairs, on H. R. 7450, 75th Cong., 3d Sess., pp. 5-6.

[17] The Solicitor of the Department of Interior has himself indicated that where the Indian has done all he could to get his patent, and has failed because of the neglect of public officers the courts will generally protect him, and that this may be proper even where there has been a failure to approve the allotment. See 55 Decisions of the Department of the Interior 295, 303-304.